



Policy Brief

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Pathway to the Operationalisation of the Common European Data Space for Cultural Heritage: Unravelling the Copyright-Related Aspects of Populating the Data Space with Cinematographic Works

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Who is this aimed at?

- EU and national policy- and law-makers

Key messages

Launched as a Union initiative in 2021, the Common European Data Space for Cultural Heritage (hereinafter 'CEDS for CH' or 'CH data space') is aimed at accelerating the digitisation, online availability and digital preservation of European cultural assets that form the cultural heritage (hereinafter 'CH') of the EU Member States and play an important role in establishing a common European identity. Acknowledging that the horizontal governance structure and legislative framework to operationalise the CH data space are expected to be provided by the EU in the later stages of the initiative, the successful realisation of this vision and the population of the CH data space urges a robust roadmap that would crystallise the key actors involved in the population of CEDS for CH, the data transfers among these actors and the legal tools and incentive mechanisms to reinforce such transfers. This need is exacerbated by the specificities of the European Film Industry (hereinafter 'EFI'), the interplay of cinematographic works with copyright and the public domain, and the Union's ambitions and endeavours to digitalise and digitally preserve in-copyright and out-of-copyright elements of the European film heritage (hereinafter 'EFH').

Introduction

The CEDS for CH constitutes a landmark in the EU's cultural and digital policies and agenda dating back to the adoption of the Lisbon strategy in 2000. This strategy commenced the transition of the EU into a knowledge-based society and data-agile economy in parallel to a wave of digitisation endeavours targeting European CH assets (see: Communication COM(2001) 140 final Communication COM(2002) 263 final).

The New European Agenda for Cultural Heritage, adopted in 2018 in the European Year of Cultural Heritage, elevated CH to one of the top priorities of the EU's digital policies and advocated for the digitisation and circulation of European artworks across Europe (see: Communication COM(2018) 267 final). The pan-European efforts to enhance the digitisation and online accessibility of CH assets, eventually, paved the way for integrating the Union's digital policies concerning CH into the EU's flagship initiative: the Common European Data Space (hereinafter 'CEDS').

Launched in 2018, the CEDS aims to unleash the potential of the extensive volume of data collected and stored within the EU by facilitating the free flow and efficient use of such data across Europe (Communication COM(2018) 232 final, Communication COM(2020) 66 final). Envisaged as 'a



seamless digital area' (Communication COM(2018) 232 final), or a smoothly operating single market for data, the CEDS would realise cross-border and cross-sectoral transfers of a multitude of types of data with different levels of intensity through a trustworthy and secure digital infrastructure (Communication COM(2018) 232 final, Communication COM(2020) 66 final). The types of data referred to in this context include but are not limited to personal and non-personal, public sector and private sector, publicly-held and privately-held, publicly-funded, machine-generated, research-related, and dynamic data. Aligned with this goal, the idea of establishing a CEDS requires innovative ways to incentivise, accelerate and legitimise data transfers within a complex network consisting not only of Government-to-Government (hereinafter 'G2G') but also Business-to-Government (hereinafter 'B2G') and Business-to-Business (hereinafter 'B2B') cooperation and data flows, also in terms of boosting the European market power and share by opening the use of such data for the development of new products and services.

Constituting one of the domain-specific data spaces incorporating the CEDS, the CH data space provides a single digital space – or, for the time being, a single internet platform – that hosts and facilitates the reuse of digital(ised) CH assets (Recommendation (EU) 2021/1970). To do so, the EC has entrusted the Consortium previously assigned to operationalise the renowned digital library of the EU: Europeana. The role that Europeana plays in the CEDS for CH is two-pronged. While the realisation of this data space relies on the Europeana Consortium's expertise in the field, CH data space is built upon the legacy of the Europeana project as Europeana's digital collections and the online platform to disseminate these collections will constitute, respectively, the input for and the hosting platform of the CEDS for CH.

Yet, a complicated task awaits the Europeana Consortium, especially from the perspective of the EFI. Whereas the Union's cultural agenda draws attention to the digitisation, online accessibility and digital preservation of the EFH, the Commission Recommendation of 10 November 2021 reveals that only 2,47% of Europeana's assets comprise audiovisual content (Recommendation (EU) 2021/1970). The percentage of cinematographic works within this 2,47 % has not been revealed within the document; however, what is made explicit is that only 45% of the overall Europeana assets are reusable (Recommendation (EU) 2021/1970).

Statement of the problem

The launch of the CEDS for CH revolutionised the legal discourse centred around CH assets for it placed them at the intersection of copyright law, data law, and CH law – legal disciplines that have originated from disparate policy objectives and evolved independently by following different paths. Yet, standing at the crossroads of these three disciplines, the challenges imposed by the CEDS for CH are multifaceted and require multi-disciplinary approaches to help unfold their layers while unveiling the policy and legislative gaps that necessitate action at the Union and national levels.



This policy brief focuses on the *preliminary* questions to be addressed from a copyright-oriented standpoint while leaving the intricacies stemming from data and CH laws to prospective policy briefs. In so doing, it concentrates on the interaction of *merely* cinematographic works or excerpts thereof with the CH data space.

Cinematographic works have been the subject of a multitude of Union policies, including the preservation of CH, revitalisation of EFI and the modernisation of the EU copyright law. Having approached their subject-matter from different angles through the lens of different disciplines, the terminology adopted in several EU documents obscures the meaning of cinematographic works, if not clash with that of the international copyright regime. Furthermore, the CEDS for CH merges the Union's cultural and digital policies without necessarily bringing clarity to the interaction of this initiative with the ongoing efforts in the digital agenda revolving around the EFH.

The definitional opacity and the lack of clarity on the Union's vision on the interaction of EFH with the CH data space complicate the identification of the legal tools and mechanisms that would help achieve the digitisation, online availability and digital preservation of EFI.

Policy Recommendations

1. Reconciliation of the definitions associated with 'cinematographic works' in international legal instruments and the EU documents

The EU copyright *acquis* does not define the concepts of work or cinematographic work. Nevertheless, several EU documents introducing the Union's cultural, digital and media policies and agenda use inconsistent terminology or use certain terminology interchangeably which eventually causes opacity in the EU policy- and law-makers' approach to and regulation of cinematographic works, especially when compared to the foundational instruments of international copyright law.

- **Cinematographic works**

The Recommendation of 16 November 2005 articulates cinematographic works as 'moving-image material of any length, in particular, cinematographic fiction, cartoons and documentaries, which is *intended to be shown in cinemas*'^[1] (Recommendation 2005/865/CE).



Whereas the underpinnings of such a formulation are unknown, this definition is neither compatible with the established norms and standards of international and EU copyright law nor with the Union's general digital policies.

Regarding the copyright-related aspects, it shall be noted that copyright law approaches its subject-matter (e.g. literary or artistic works) by associating the work with its author/creator rather than its target audience. Accordingly, it centralises the intellectual creation, which is the expression of an idea; and it entitles the author/creator of an intellectual creation of such expression, in principle, if it is original, in the sense that 'it is the author's own intellectual creation'^[2]. In line with this principle, Article 2(1) of the Berne Convention refers to cinematographic works as a sub-category of literary and artistic works. And stipulates that:

'[t]he expression "literary and artistic works" shall include *every production* in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as (...) *cinematographic works to which are assimilated works expressed by a process analogous to cinematography* (...)'.^[3]

However, by reducing cinematographic work to a means of mass entertainment, the Recommendation excludes a significant portion of original works acknowledged as copyright-protected cinematographic works (e.g. born-digital films produced for video-on-demand or DVD industry) from the globally accepted description of the term.

As to the Union's overall digital policies, this approach implies the existence of a cultural valorisation scheme which ranks cinematographic works produced for the primary window of cinema (i.e. movie theatres) higher than those produced for the secondary windows (e.g. television broadcasts, video-on-demand platforms, online-content sharing platforms). Nevertheless, the inevitable impact of the technology and internet on the production and dissemination of cultural content has been one of the justifications for the Union's policies and legislative endeavours to support and facilitate the accessibility and use of digital cultural content, as evidenced by the Regulation (EU) 2017/1128 on the portability of online content services.

● Cinematographic works v. Audiovisual content

The terminology adopted within the EU copyright and media instruments adds to the terminological opacity (see: Poll, 2002). Indeed, Directive 2006/115/EC employs the term 'film' as an umbrella category that encompasses cinematographic works; it defines films as 'a cinematographic or audiovisual work or moving images, whether or not accompanied by sound'. Neither this Directive nor any others offer any indicators of the difference between cinematographic works, audiovisual works or moving images. However, Directive 93/83/EEC and Directive 2006/116/EC use cinematographic works



and audiovisual works interchangeably while Directive 2001/29/EC, in line with the international copyright instruments, employs a new term: first fixation of films, without necessarily defining it. On top of all these, Directive 2010/13/EU refers to cinematographic works, audiovisual works and films as separate categories of cultural content.

- **Cinematographic works v. Works of visual art**

Last but not least, Article 14 of the Directive (EU) 2019/790 contains a legal provision that is pivotal to the reuse of digital copies of cinematographic works that have fallen into the public domain. This provision, however, employs the term ‘works of visual art’ which has not been defined or used before in the EU copyright legislation or related documents. Neither the international copyright instruments use or define this term, whereas a broad interpretation of the term would encompass cinematographic works (Benabou et al., 2020; Rosati, 2021).

Against this background, the EU legislative framework would benefit from the EU’s intervention to crystallise the differences between such concepts used in the EU copyright and media legislation and to streamline the use of such concepts vis-à-vis international legal instruments.

2. Clarification of the expectations at the Union and national levels regarding the interplay of cinematographic works with the Common European Data Space for Cultural Heritage

The Commission Recommendation of 10 November 2021 consists of quantitative data, annexed to the main document, which reflects on the total sum of the digital records held by each Member State as of 2021 as well as the short-term and long-term indicative targets to be achieved in digitisation of cultural assets, respectively, by 2025 and 2030. Having such clear goals surely provides the EU with opportunities to accelerate and monitor the progress of the digitisation activities at the national level, as the latter would eventually facilitate the operationalisation of the CEDS for CH. Nevertheless, once the features unique to cinematographic works are taken into account, it becomes inevitable to complement these quantitative goals with qualitative ones that would guide the digitisation endeavours of the Member States.

Whereas the Union’s policies on the digitisation and online availability of CH assets have mainly targeted public domain materials, neither the Union’s cultural agenda nor the definitions embraced by the Union documents construe or decrease CH to a set of archival cultural assets that are no longer protected by copyright.^[4] Yet, the interplay of copyright with cinematographic works complicates the ambitions of the Union and the Member States to digitise and disseminate digital copies of cinematographic works or excerpts thereof via the CEDS for CH.



Cinematographic works are usually joint-authored works. The term of copyright protection granted upon cinematographic works lasts during the lifetime of its authors and 70 years post-mortem, which shall be calculated from the death of the last surviving person who was involved in the creation of the work either as the principal director, the author of the screenplay, the author of the dialogue or the composer of music specifically created for use in the work (Directive 2006/116/EC). Considered along with the invention of cinematography in the 1890s, it could be presumed that a significant portion of the cinematographic works that are essential to the European CH still enjoy copyright protection.

It is also worth noting that the audiovisual assets available on the Europeana platform are mostly composed of excerpts of television broadcasts, whereas there is no concrete evidence to suggest that Europeana collections include cinematographic works or their excerpts. Neither there is evidence to clarify whether the Union or the Europeana Consortium have ever aimed to make cinematographic works available on this online platform.

In this sense, the Member States and the custodial and memory institutions across Europe would benefit from a prospectus that would crystallise the Union's expectations concerning the digitalisation, online accessibility and preservation of European cinematographic works vis-à-vis the Union policies centred around the preservation of the European film heritage.

3. Mitigating the digitisation of cinematographic works of the public domain: Setting up guidelines on the interpretation and application of Article 14 of the Directive (EU) 2019/790 to the digitalised cinematographic works

Article 14 of Directive (EU) 2019/790, for the first time in the EU legislative history, introduced a legal provision directly addressed to the public domain. This provision requires EU Member States to take the necessary measures to protect the public domain by preventing the revival of legal protection over the copies of reproduced works of visual art.

The provision stipulates 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'. The act of reproduction as such shall be understood in broad terms, as suggested by a multitude of EU Directives (see: Directive 96/9/EC, Directive 2001/29/EC, Directive 2009/24/EC; also see: Rosati, 2021). Therefore, the reproduction as such can go beyond a faithful reproduction of the public domain material, and it can be 'direct or indirect, temporary or permanent, by any means and in any form (e.g. two- or three-dimensional reproductions, analogue or digital reproductions, etc.), in whole or in part' (Rosati, 2021).



Whereas this legal provision was transposed, vastly, *verbatim* into Member States' national copyright laws (see: *Copyright Flexibilities*, 2023), its interpretation by the Court of Justice of the EU and application by the national courts are yet to be seen. Nevertheless, many scholarly works already flag the possible outcomes of the interaction of this provision with the digital reproduction of cultural assets.

In the meantime, the applicability of this provision to the digital copies of out-of-copyright cinematographic works fixated on analogue media remains unresolved. In practice, the digitisation of content as such is often accompanied by certain other actions, for instance, restoration of the film, colourisation (also of originally black and white films), adjustment of the saturation and tinting, dubbing, insertion of subtitles and synchronisation of the audio and subtitles (see: Bader, 1986; Op den Kamp, 2018). Nevertheless, there is no precedent set, especially in the EU copyright law, whether these acts, which modify the original work, lead to the creation of a derivative work eligible for copyright protection.

Against this background, the Union endeavours to preserve European film heritage, also given the Union's aim to digitise 'all public domain masterpieces' (Recommendation 2011/711/EU), would benefit from legal clarity on the application of Article 14 of the Directive (EU) 2019/790 to the cinematographic works that have fallen into the public domain.

4. Planning the way ahead: Introducing a legislative framework for the governance structure for the Common European Data Space for Cultural Heritage

By no means overlooking the fact that the CEDS for CH is at its earliest stages, especially compared to the formerly launched data spaces, such as the European Health Data Space (hereinafter 'EHDS'), the successful operationalisation of CH data space requires a robust roadmap and a legislative framework that would provide a governance structure tailored to this roadmap.

At the time being, the CEDS for CH gives the impression of being an advanced model of the Europeana platform. Indeed, the CH data space initiative is administered by the Expert Group led by the Europeana Consortium, and it builds upon Europeana's digital collection efforts and cultural assets while also aimed at disseminating these assets via the Europeana platform. This reality blurs the lines that differentiate the CEDS for CH initiative from that of Europeana (also see: Keller, 2021).

Furthermore, the existing EU documents on the CEDS for CH encourage EU Member States to take measures that would help populate the Europeana platform. Nevertheless, the vision of CEDS, which is expected to be shared by all the domain-specific data spaces, dwells upon data transfers between a complex network of multiple stakeholders, including those of B2G and B2B data transfers – and not just for non-commercial but also for commercial purposes. Nevertheless, the current scheme



envisages CEDS for CH to flow through a thin horizontal line connecting Europeana to data aggregators connected to public cultural heritage institutions and galleries, libraries, archives and museums. This system not only eliminates the vertical lines expected to connect public and private institutions as well as end-users, but it also overlooks the fact that CH assets are held or owned by private custodial and memory institutions or other private actors.

Despite its inauguration in 2021, the CEDS for CH would still benefit from a robust legislative framework setting up the network of public and private actors to be involved in the operationalisation of this data space and regulating the data transfers among the actors to be involved in the population of this data space (also see: Islam et al., 2022; Niccolucci et al., 2022), as has been done by the proposed Regulation for EHDS.^[5]

Such an endeavour would, initially, require a meticulous assessment of the EU copyright *acquis* and the pan-European copyright landscape to contemplate their capacity to facilitate the digital reproduction of in-copyright elements of CH as well as the communication and making available to the public of digitised CH assets, especially in the aftermath of the transposition of Directive (EU) 2019/790. Indeed, the European copyright discourse would benefit from an up-to-date and comprehensive analysis of the opportunities provided and challenges imposed by the EU and national copyright laws on the operationalisation of the CEDS for CH, which would reflect on the impact of Directive 2012/28/EU on the digitisation of orphan works and the extended collective license schemes enshrined in Article 8 of Directive (EU) 2019/790 on the digitisation of out-of-commerce works. It is also essential to collect and analyse empirical evidence on the possible impacts of copyright exceptions and limitations (hereinafter 'E&Ls'), which are envisioned only for non-commercial uses, on the public and private partnerships to be established for large-scale digitisation projects, such as CEDS for CH.

With respect to the outcomes of such research activities, the horizontal governance structure to be enacted for the CH data space would be able to elaborate on the public and private entities to be involved in the operationalisation of this data space, to augment the existing copyright tools or to introduce a new set of E&Ls or compulsory licensing schemes to enable the digitisation of the cornerstones of the European CH, including those of EFH.

[1] Emphasis added.



[2] This phrase has been embraced by the cornerstones of the EU copyright *acquis* in order to define the originality criterion sought for copyright protection. See: Directive 96/9/EC, Art. 3(1), Directive 2009/24/EC, Art. 1(3); Directive (EU) 2019/790, Art. 14.

[3] Emphasis added.

[4] The Commission Recommendation of 10 November 2021, while explaining the purpose and scope of this instrument in its Article 1, embraces a broad articulation of CH by encompassing ‘all types of cultural heritage (tangible, intangible, natural, born-digital)’ (Recommendation (EU) 2021/1970). In the same line, Article 2 thereof refers to ‘archival documents’ as an example clustered under tangible CH. The EU’s approach to CH therein is not only aligned with the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage and the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, both of which acknowledge CH as a dynamic rather than a static phenomenon, but also the Union’s policies addressed to the population of the Europeana platform. The Commission Staff Working Paper, released in 2008, clarifies that the Europeana platform initially aims to digitise and make available online the content allocated to the public domain, while the dissemination of more actual content protected by copyright is also within the agenda (Commission Staff Working Paper SEC(2008) 2372).

[5] See: Proposal for a Regulation of the European Parliament and of the Council on the European Health Data Space, COM/2022/197 final.

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This policy brief, focusing on copyright-related aspects of the topic of choice, comprises the first part of this endeavour and will be complemented by a second part focusing on the data law-related aspects



and a third one focusing on the cultural heritage law-related aspects of the operationalisation of the CEDS for CH.

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