



Policy Brief

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Pathway to the Operationalisation of the Common European Data Space for Cultural Heritage: On the Interplay of Cultural Heritage Law and Digital Cultural Assets

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Who is this aimed at

- EU and national policy- and law-makers
- Industrial stakeholders
- Cultural heritage institutions

Key messages

The Common European Data Space for Cultural Heritage (hereinafter 'CHDS') was launched by the European Union (hereinafter 'EU') in 2021 as one of the fourteen domain/sector-specific data spaces setting up the Common European Data Space (hereinafter 'CEDS') promoted by the European Strategy for Data (Communication COM(2001) 140 final Communication COM(2002) 263 final). The CHDS aims at accelerating the digitisation, online availability, reuse and digital preservation of diverse forms of European cultural assets (i.e. tangible, intangible, movable, immovable, natural, born-digital, analogue) forming the cultural heritage (hereinafter 'CH') of the EU Member States (Recommendation (EU) 2021/1970).

Audiovisual/cinematographic content constitutes one of the key areas of the CHDS due to the low rate of digitisation of this category of CH assets and the risk of deterioration of the media on which such cultural content is fixated (Recommendation (EU) 2021/1970, Recommendation 2011/711/EU, Recommendation 2005/865/CE). However, the digitisation, reuse and cross-border flow of digital audiovisual/cinematographic content is a complicated task due to, on the one hand, the distribution of competences between the EU and the Member States and, on the other hand, the bundle of overlapping (if not clashing) EU and national legal regimes governing the digitisation, online availability and reuse, and digital preservation of audiovisual/cinematographic content.⁷

The European Commission (EC) referred to the enactment of an implementing act for the CHDS in the near future (Commission Decision C(2021) 4647 final). The successful realisation of this plan and the population of the new data space with audiovisual/cinematographic content not only urges the adoption of a robust roadmap that could facilitate data transfers among key stakeholders/market actors, but also requires a meticulous assessment of the legal tools and incentive mechanisms available and to be provided in order to enable the digitisation of such content and data transfers in a reliable and interoperable information technology (IT) infrastructure.

⁷ For the copyright-related aspects related to the operationalisation of the CHDS, please see the first part of this policy brief series. See: Sarikakis, K., Ramadani, G., Chatziefrimidou, A., Juengst, J., Psychogiopoulou, E., Samaras, A., Comerma, L., Vlassis, A., Riga, D., Sganga, C., Turan, P., Lähdesmäki, T., & Hiltunen, K. (2024). Policy briefings deriving from WP2-5. Zenodo. <https://doi.org/10.5281/zenodo.10605192>.



This document, which constitutes the second part of the policy brief series dedicated to the operationalisation of the CHDS, addresses the cultural heritage law-related aspects of the data-sharing practices concerning the digitisation and transfers of digital(ised) audiovisual/cinematographic content.⁸

Introduction

The CHDS constitutes a landmark initiative in the EU cultural and digital policies and agenda since the adoption of the Lisbon strategy in 2000. This strategy launched 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 (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 (Communication COM(2018) 267 final). The EU-wide 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 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', 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 IT 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- and private-sector, publicly-held and privately-held, publicly-funded, machine-generated, research-related, and dynamic data.

As one of the domain/sector-specific data spaces incorporating the CEDS, the CHDS envisions a single digital space facilitating the sharing of born-digital and digitised CH assets, including works of European film heritage (Recommendation (EU) 2021/1970). Nevertheless, the limited success of

⁸ This policy brief stems from the research conducted for a prospective publication, entitled "Common European Data Space for Cultural Heritage: Is the European Union Taking the 'High Road' from 'A Single Access Point' to 'A Single Market for Data' for Digital Cultural Content?", co-authored by Pelin Turan and Caterina Sganga, which has been presented by the co-authors at the EPIP 2024 Conference co-organised by and held in September 2024 at the premises of Scuola Superiore Sant'Anna and the University of Pisa.



the EU Member States in digitising audiovisual/cinematographic content necessitates the collaboration of several stakeholders/market actors to map the needs of the CH sector/domain and to assess to what extent the current EU and national legal regimes might be of help to realise the CHDS ambitions.

Statement of the problem

The launch of the CHDS space revolutionised the legal discourse centred around CH assets, placing them at the intersection of copyright law, data law, and cultural heritage law, which are legal disciplines originating from disparate policy objectives and evolved independently by following different paths. Standing at the crossroads of these three bodies of law, the challenges faced by the CHDS are multi-faceted 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.

The complications imposed by cultural heritage law upon the operationalisation of the CHDS are two-pronged.

On the one hand, the establishment of a digital infrastructure opening the access to and reuse of multiple categories of CH assets – including those of audiovisual and cinematographic content – to public bodies, citizens and businesses for both commercial and non-commercial purposes requires a common perception of what constitutes European film heritage and an EU-wide standard in selecting and digitising the assets to be used to populate the CHDS. Nevertheless, the limited EU competence in matters concerning culture and CH hinders any harmonisation endeavours at the Union level, leaving the regulation of this area to the discretion of Member States. Article 167 of the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’) holds that the EU ‘shall contribute to the flowering of the cultures of Member States, while (...) bringing the common cultural heritage to the fore’. In this sense, the EU’s competence and role are limited to encouraging cooperation across the Union and, if necessary, supporting and supplementing the national actions, such as dissemination of culture, preservation and safeguarding of CH, and cultural exchanges of a non-commercial nature (TFEU, Article 167(2)). Whereas the EU is given the power to adopt incentive measures to achieve these goals, Article 167(5) TFEU clarifies that such efforts cannot result in ‘harmonisation of the law and regulations of the Member States’. This implies that the operationalisation of the CHDS heavily depends on the different national views of CH embraced by disparate Member States.

On the other hand, recent trends in the international and regional policy-making and norm-setting forums show a positive shift from a ‘static’ depiction to a ‘dynamic’ understanding of CH (Faro



Convention, Article 2(a), Communication COM(2018) 267 final). Emphasising the ‘constant evolution’ of the values, beliefs, knowledge and traditions that form CH, these instruments also enable the consideration of not only ‘old’ works that have fallen into the public domain but also of ‘new’ works protected by copyright in the context of CH. Such a broad articulation of CH, nevertheless, requires guidance on the interplay of national CH laws with the EU and national copyright regimes – especially given that the in-copyright and public domain status of CH assets plays a crucial role in the EU data laws applicable to the sharing of digital(ised) CH assets (Directive (EU) 2019/1024, Art. 1(2)(c); Regulation (EU) 2022/868, Art. 2(11)).⁹

Policy recommendations

- 1) The successful deployment of the CHDS primarily depends on a shared understanding of CH and a harmonised selection of assets to be digitised for the purposes of a data space dedicated to CH. To achieve this goal, **the EU shall adopt soft law instruments to guide the Member States through the identification and selection of CH assets to be digitised for the CHDS**, whilst taking into consideration the distribution of powers, and without prejudicing Member States’ discretion to regulate the legal regime applicable to national CH in light of national cultural priorities and policies.
- 2) Likewise, for the successful deployment of the CHDS, the EU shall mentor and monitor the digitisation of CH asserts by collecting **empirical evidence** via comprehensive studies, which could map **the past and ongoing CH digitisation endeavours of the Member States** and develop, on this basis, **codes of best practices to engage in such digitisation projects vis-à-vis the experiential knowledge held by the Member States and their competent bodies**.
- 3) The population of the CHDS with audiovisual/cinematographic content urges **clarification of the EU vision and plans on the interplay of such content with the CHDS**. At the time being, the information disseminated by the EC does not go beyond the need to digitise audiovisual/cinematographic content. Nevertheless, the feasibility of enabling online access to and reuse of digital(ised) audiovisual/cinematographic content requires further clarification on the EC’s expectations from the Member States and the means to promote and enable the reuse of such content in line with the EU data economy goals (e.g. boosting data-based innovation, goods and services).

⁹ The data law-related aspects of the operationalisation of the CHDS are to be analysed in the context of the third part of this policy brief series and will be consolidated into Deliverable 7.14 due in Month 36 of the REBOOT project’s life-cycle.



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- 4) Last but not least, the EU shall introduce **incentive mechanisms** to gather **empirical evidence** aimed at mapping and understanding how copyright, cultural heritage and data regimes in different Member States **interact over national CH assets**. The mechanisms adopted at the national level to cope with the intricacies of this interplay could shed light on the need for further legislative interventions in areas that fall under the scope of the EU competences, or soft law instruments in areas that are subject to the discretion of Member States.



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