

Barriers to licensing out-of-commerce works under Article 8:

The experience of cultural
heritage institutions

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Abstract

In April 2026, COMMUNIA convened an online meeting with practitioners from the cultural heritage sector to examine persistent obstacles related to the making available of out-of-commerce works (OOCWs) under Article 8 of the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive). Seven participants from six Member States (Austria, Germany, Italy, the Netherlands, Slovenia, and Sweden) identified challenges that render the application of the mechanism difficult in practice. This report provides an overview of the main findings and sets out recommendations for strengthening the framework.

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Background

Article 8 of the DSM Directive introduced a framework intended to enable cultural heritage institutions (CHIs) to make OOCWs available online for non-commercial purposes. It applies to works that remain protected by copyright and are held in CHI collections but are no longer commercially available, or were never commercially available, including both published and unpublished materials.

The framework is based on an extended collective licensing model, allowing collective management organisations (CMOs) to issue licences not only on behalf of their members but also of non-members, based on a presumption of representativeness. Where a CMO is sufficiently representative for the category of works and rights in question, a CHI must seek a licence. A fallback exception applies only where no CMO exists or can be considered sufficiently representative. Information about the works must be registered in the EU Intellectual Property Office's (EUIPO) [Out-of-Commerce Works Portal](#) at least six months before they are made available online (Article 10), and rightsholders retain the right to opt out.

Five years after the entry into force of the Directive and with the review now underway, this is an appropriate moment to take stock. So far, the objective of unlocking access to Europe's cultural heritage and closing the "[20th Century Black Hole](#)" has not been realised. As of April 2026, 2.72 million works have been registered in the EUIPO portal. While this represents a clear improvement compared to Article 8's spiritual predecessor, the Orphan Works Directive, a closer examination of the data reveals a fundamental imbalance: the vast majority of registrations originate from just four countries—Slovakia, the Czech Republic, the Netherlands, and Germany.²

The evidence presented by the participants of our meeting consistently points to structural barriers linked to the licence-first approach established by Article 8.

Main findings

- Negotiations are often lengthy, complex, and resource-intensive, despite the limited or non-existent commercial value of the works concerned.
- Licensing conditions vary considerably across agreements, the resulting terms can be impractical for cultural institutions, and fees can place a significant strain on the already limited budgets of CHIs.
- Legal uncertainty remains high, particularly regarding the criteria for representativeness of CMOs.
- Where CHIs rely on the exception, its application tends to be cautious and limited in scope.

² For an in-depth analysis of the application of Article 8 across the EU, see Maarten Zeinstra's [blogpost](#). See also Knowledge Rights 21's report [Out of Commerce, Out of Order](#).

Protracted negotiations

Licensing negotiations for OOCWs between CHIs and CMOs are often lengthy and resource-intensive. They require substantial staff time and frequently entail additional costs, particularly for legal advice. Moreover, the negotiations tend to be hard-fought, especially where they concern questions around remuneration. Practitioners participating in the meeting considered the effort required to be disproportionate, given that while the works concerned have significant societal value, they generally have little or no commercial value.

According to the participant from the German National Library, negotiations between the German federal government and the Länder—conducted in consultation with German CHIs—on the one hand, and two CMOs on the other, took four years to conclude for a framework agreement covering written OOCWs. The process was marked by considerable complexity and disagreement, particularly regarding reasonable compensation and the use of works for scientific AI-related purposes, despite the existence of a previous agreement that had expired in June 2021.

Similarly, a representative of the Dutch CHI sector reported that reaching agreements took around two years for musical and audiovisual works each. Negotiations concerning periodicals extended to three years before an agreement was reached. The length can be attributed to difficulties in aligning expectations, particularly in conveying that these uses serve the preservation and dissemination of cultural heritage rather than commercial exploitation.

The Dutch participant also shared that delays are common, with meetings frequently postponed or cancelled at short notice. While this does not necessarily indicate a lack of willingness on the part of CMOs, it suggests that such negotiations are not treated as a high priority. Notably, this occurs in a country that ranks among those with the highest numbers of registered objects in the EUIPO database.

These examples point to a broader structural issue. Licensing negotiations impose significant costs on institutions operating with limited public resources—resources that are intended to enable CHIs to fulfil their public mission. In many cases, CHIs are the sole custodians of these works and already invest considerable effort in their conservation and digitisation. Requiring them to incur additional costs to make these works available in digital form creates a substantial barrier, and in some cases an insurmountable one. Many CHIs in other Member States neither have the necessary expertise to engage in such negotiations, nor the capacity to sustain them over extended periods. As a result, many CHIs refrain altogether from pursuing such agreements and the practical effectiveness of the OOCW framework is significantly diminished.

Licence refusal

In at least one documented case in Sweden, a representative CMO refused to engage in licensing negotiations with a CHI. While this is the only such case reported in our meeting, participants also referred to cases where negotiations failed to progress beyond the initial stages, even after extended periods. In practice, this has the same effect as a refusal.

The Swedish participant explained that her university library approached the relevant CMO in 2024 with the aim of making OOCWs from its collection available. The CMO had previously issued a collective licence for educational uses to the Association of Swedish Higher Education Institutions, suggesting that it should be considered representative for the purposes of the OOCW framework. The initial response, however, was negative: the CMO stated that it was not in a position to enter into such agreements, while indicating that it might explore the possibility in the future.

Following a second inquiry, the position became more definitive. The CMO clarified that it does not currently offer such licences and has no plans to do so, citing a lack of mandate from rightsholders. Neither the Swedish Intellectual Property Office nor the Swedish Competition Authority were able to provide an effective remedy. This outcome is particularly striking given Sweden's long-standing experience with extended collective licensing.

Given the administrative burden and the limited financial returns associated with these licences, CMOs may have little incentive to engage in negotiations at all. Where a CMO refuses to license, whether explicitly or by offering unreasonable terms, there is no effective fallback mechanism. In such cases, CHIs are left unable to proceed, which significantly limits the practical utility of the OOCW framework.

Unfair licence conditions

Even where negotiations are successful, the resulting licensing terms can impose significant burdens on CHIs. In particular, high per-item licensing fees and obligations relating to text-and-data mining (TDM) and AI uses create practical and financial obstacles. With few exceptions, participants in the stakeholder discussion identified licensing costs as a major concern—and a key deterrent to pursuing further agreements.

Under the German framework agreement, fees are tiered according to publication date and capped for periodicals where licences are sought for more than twelve issues per title and publication year. Nevertheless, from the perspective of CHIs, these fees remain substantial, reaching up to €50 per book from the late 1980s and €12.50 even

for works more than 70 years old. The representative of the German National Library noted that, at scale, such costs become prohibitive and effectively render mass digitisation projects unfeasible.

A representative of an Austrian university library stated that her institution's agreement is based on a comparable cost structure. These financial burdens are particularly difficult to justify given that many OOCWs have little or no commercial value, and in some cases were never intended for commercial distribution.

While the German and Austrian agreements rely on one-off payments, agreements in the Netherlands require ongoing payments, which complicate budget planning and lead to cumulative cost increases. Such models are particularly problematic because, if a licence is not renewed, CHIs may be required to take down previously digitised works, undermining prior investments in digitisation, dissemination and their public mandate to ensure reliable access to information and cultural heritage.

The emergence of AI has further complicated licensing negotiations and the making available of OOCWs. A number of recent licence agreements require CHIs to opt out works from commercial text-and-data mining under Article 4 of the DSM Directive. CHI practitioners argued that this can be challenging for two reasons. First, it is often uncertain whether CMOs have the mandate to exercise the rights reservation on behalf of their members. Moreover, OOCW licences are extended collective licensing agreements that involve mostly works from non-member rightsholders. CMOs clearly lack the mandate to opt out on their behalf. Second, and more importantly, CHIs face uncertainty regarding the measures required to give effect to such opt-outs, such as which tools or standards to use for stating the opt-out in a machine-readable way and whether to implement technical protections against crawling and scraping.

In sum, without an effective fallback to incentivise fair licensing terms, the framework creates a significant imbalance, leaving CHIs in a "take-it-or-leave-it" position.

Legal uncertainty

CHIs seeking to make OOCWs available face significant legal uncertainty, particularly regarding the representativeness of CMOs. In many cases, it is unclear whether a CMO can be considered sufficiently representative for the relevant category of works and rights, and therefore whether a CHI is required to seek a licence in the first place.

This uncertainty is further compounded by the composite nature of many works held in CHI collections. While musical and audiovisual works are obvious examples, even books and periodicals frequently combine different types of protected content, such as text and illustrations. As a result, CHIs are often unsure whether they must engage with multiple CMOs, each claiming representativeness for different categories of

protected materials contained in a work, and not for the work as a whole.

Given that negotiating with a single CMO already presents significant challenges, the need to engage with several organisations can quickly become unmanageable, particularly where CMOs adopt divergent positions or fail to coordinate. In practice, this creates a substantial barrier to the use of the OOCW mechanism.

A practitioner from the German Federal Archives shared that the institution has relied on the exception for one category of materials where they had strong reason to believe that no CMO should be considered representative. However, for another category of archival holdings, uncertainty regarding the need to negotiate with a CMO led the institution to seek a legal opinion. While arguments were identified in favour of relying on the exception, no definitive conclusion could be reached within the institution yet. The practitioner argued that the prospect of having to enter into negotiations with an uncertain outcome would deter the institution from making these materials available altogether, particularly in light of anticipated budget cuts.

The participant from an Austrian university library reported similar issues arising from the composite nature of works covered by an agreement with a CMO for literary rights. As many of these works also contain illustrations, the institution remains uncertain whether an additional licence from a CMO representing image rights is required, potentially involving further negotiations and additional remuneration.

According to the Dutch practitioner, in a case involving composite works, a CHI concluded an agreement with a CMO, only for a different CMO to subsequently threaten legal action, thereby undermining work that had already been carried out. In another instance, a licence agreement imposed a contractual obligation on the CHI to also contact publishers for confirmation of the OOCW status—an approach that goes beyond the framework established by the DSM Directive.

An Italian practitioner stated that CHIs had initially expressed strong interest in using the OOCW mechanism. However, the absence of clear criteria for determining the sufficient representativeness of CMOs has proven to be a major obstacle. The Italian Copyright Law further complicates matters by requiring CHIs to engage with the three most representative CMOs when the author did not confer any mandate to a CMO. In practice, this has raised unresolved questions. It is unclear whether CHIs must negotiate with one or all three organisations, and which ones should be involved. This has led to a complete standstill.

The participant shared two examples of the chilling effect created by this uncertainty. The Central State Archives in Rome attempted to digitise materials from a 1942 exhibition but was forced to suspend the project due to the administrative burden involved. A similar experience was reported by the National Central Library of Florence, where CHIs encountered difficulties in verifying authorship and determining whether works had been out-of-commerce for the required period under national law.

The consistency of these experiences across workshop participants suggests that the

challenges are not merely issues of implementation, but reflect a shortcoming of the legal framework. Article 8(2) conditions the application of the exception in the absence of a “sufficiently representative” CMO, without clearly defining this concept. As a result, representativeness has become a central and contested issue in practice.

As Teresa Nobre finds in [The Post-DSM Copyright Report](#), most Member States have not introduced concrete criteria, often transposing the Directive’s language with little further elaboration. Where criteria do exist, they vary significantly. Some rely on vague qualitative thresholds, such as a “vast majority” (Estonia), a “significant number” (France and Malta), or a “sufficiently large number” (Germany), while others avoid the concept altogether, referring instead to “representative” or “authorised” organisations.

Working under the exception

In some countries, or for certain categories of works or rights, no sufficiently representative CMOs exist. In such cases, CHIs may rely on the fallback exception to make out-of-commerce works available. A notable example is the National and University Library of Slovenia. As no CMO represents literary works in Slovenia, the library has begun making such works available in the context of an EU-funded digitisation project, and has later applied the exception to their regular yearly practice.

In doing so, the institution applies a rigorous verification process. The Slovenian participant reported that each work is individually assessed to confirm its OOCW status across multiple sources, and the entire process is carefully documented. They also take into account the popularity of works, the year of the last published edition, and moral rights for works that were never commercially available.³

This approach demonstrates a high level of diligence and caution, showing that, in the absence of licensing arrangements, CHIs also make OOCWs available in a highly responsible manner.

³ The Slovenian institution currently faces significant challenges due to the restriction that eligible works must have been published in EU Member States. Many of their works originate from former Yugoslav countries or were published abroad by Slovenian authors, and represent a significant part of their cultural heritage, which they currently cannot include in the exception.

Conclusions and Recommendations

Article 8 of the DSM Directive represents an important step towards improving access to OOCWs. However, seven years after its adoption, significant structural weaknesses have become apparent. Most notably, licences for OOCWs are still not readily available in practice.

The key issue is that the system relies on actors who have little economic incentive to make it work. While extended collective licensing was intended to facilitate agreements between CHIs and CMOs, the appeal for CMOs to engage remains limited due to the low financial returns associated with such licences. At the same time, the bargaining position of CHIs is comparatively weak. Where agreements cannot be reached—or negotiations fail to progress—CHIs are left without viable alternatives and must often refrain from making works available, leaving culturally valuable materials inaccessible.

In light of these challenges, we suggest that the opportunity of the DSM review should be used to introduce the following changes and clarifications to the OOCW mechanism. These are COMMUNIA's proposals and do not necessarily reflect the positions of the practitioners who contributed to the meeting.

RECOMMENDATION 1

The exception should apply where suitable licences are not easily available

Article 8(2) of the DSM Directive should be amended to ensure that the exception can apply where suitable licences from sufficiently representative CMOs are not easily available in the market and adequate to the needs of CHIs.

In particular, the fallback exception should be triggered not only in the absence of a sufficiently representative CMO, but also where licences that meet the needs and specificities of cultural heritage institutions are not reasonably accessible in practice. This would realign incentives for CMOs to engage constructively, promoting the conclusion of licences.

RECOMMENDATION 2

The criteria for representativeness of CMOs should be clarified

The experience of CHI practitioners suggests that, in practice, it is often difficult to determine whether a CMO can be considered sufficiently representative for a given category of OOCWs and rights. As Teresa Nobre's [Post-DSM Copyright Report](#) shows this problem is even more pronounced in some Member States due to implementation issues, potentially contributing to the uneven effectiveness of the OOCW regime.

If the system is to function as intended, clearer and harmonised criteria for assessing representativeness are needed. Such criteria could include thresholds, but also limiting the representativeness to works that have been created in a professional context or excluding works that have been produced long before the establishment of a CMO as such works have never been part of a CMO's repertoire.


A potentially constructive solution to the issue of having to involve multiple representative CMOs (as encountered in the Netherlands and Austria) can be found in Bulgaria. Here, users are explicitly exempted from liability, while CMOs are required to resolve their claims among themselves. This mechanism reduces legal risk for CHIs and ensures that uncertainty regarding representativeness does not translate into exposure to infringement claims. While this provision applies only where multiple CMOs claim representativeness for the same category of works or rights, legal certainty could be further strengthened by using this model and extending it to cases involving composite works.

About COMMUNIA

The COMMUNIA association advocates for policies that expand the Public Domain and increase access to and reuse of culture and knowledge. It acts as a network of like-minded activists, researchers and practitioners based in Europe and the United States who seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

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