

## Towards the 2008 review of the Directive on PSI re-use

### Briefing Paper for 2<sup>nd</sup> Law and Regulation Meeting

### *E-exploitation of Cultural Information - a need for a European hand?*

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#### ePSIplus an introduction

ePSIplus is a Thematic Network, funded by the European Commission under the eContentplus programme to support the implementation of the **European Directive on Public Sector Information (PSI) Re-use**, in the period leading up to its review in 2008.

The ePSIplus Thematic Network will be active for 30 months from September 2006 through to February 2009 and will bring together the PSI community at large across Europe through a series of national and thematic meetings culminating in a final conference. These events will be supported throughout the duration of the project by the ePSIplus web site - [www.epsiplus.net](http://www.epsiplus.net); *Europe's one stop shop on Public Sector Information*. The ePSIplus Thematic Network is working closely with the European Commission in order to support the review of the Directive that will be undertaken and completed by the European Commission ready for July 2008.

The ePSIplus Thematic Network will focus on five major themes:

1. Legal and regulatory progress and impact
2. Public sector organisation and culture change
3. Encouraging PSI reuse business
4. The financial impact: pricing and charging
5. Information management, standards and data quality

#### Introduction

What is the point in holding this thematic meeting? This background document states the case. It provides a picture of how Cultural Heritage Information (CHI) was 'left behind' at the time of the Directive on PSI re-use and it raises the question whether this was the right thing to do.

#### The Directive - CHI 'lobbied out'

In December 2003 the EU adopted the PSI Directive (2003/98/EC). The Directive aimed to put in place a framework for the conditions governing reuse of public sector in order to ensure fair, proportionate and non-discriminatory conditions for the re-use of such information. However, under Article 2, CHI was exempted from applicability:

2. This Directive shall not apply to:

(...)

(d) documents held by public service broadcasters and their subsidiaries, and by other bodies or their subsidiaries for the fulfillment of a public service broadcasting remit;

(e) documents held by educational and research establishments, such as schools, universities, archives, libraries and research facilities including, where relevant, organisations established for the transfer of research results;

(f) documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres.

Subsequently, at present, public content holders of CHI are not under the obligations laid down in the Directive, such as the principles of transparency, fair pricing, accountability and non-discrimination.

Why was CHI left out? Close reading of the provisions of the Directive does not provide us with any answers nor do the recitals give us many clues. Interestingly, these exemptions were taken on board during the proceedings in Parliament, as a result of strong opposition from some Member States and lobbying by some stakeholders, (public) content holders in particular.<sup>1</sup> This becomes even more apparent when looking at the other exemptions under Article 2 of the Directive, which are mainly of a general, horizontal nature (related to access, secrecy and intellectual property rights of third parties). In other words: the CHI exemptions are perhaps the major 'sectoral' exemption.

### **But why? - Economic significance of CHI is paramount**

From an economic perspective it does not seem to make sense: the Directive is specifically aimed at valuable PSI with high exploitation potential. Interestingly, CHI is probably the most valuable PSI of all. In fact in the Lisbon Strategy CHI was already identified as a catalyst for creativity for growth and jobs. Furthermore, in a recent independent study carried out for the European Commission it was estimated that more than 5 million people worked in 2004 for the cultural sector, equivalent to 3.1% of total employed population in EU-25. The cultural sector contributed around 2.6% to the EU GDP in 2003, with growth significantly higher than that of the economy in general between 1999 and 2003.

Furthermore, in various recent European policy documents it was stressed that the cultural and creative sectors foster creativity and contribute to innovation in other sectors of the economy, being crucial for the further development of ICT, the flagship industry of the Lisbon strategy, as they provide content for digital devices and networks.

Moreover, big technology providers (e.g. Microsoft and Google) have also discovered the huge value embedded in CHI. Establishing public-private-partnerships with public content holders, such as libraries, they are awarded certain exclusive rights, in return for infrastructural investments. This form of cooperation is not, by definition a bad thing. However, the protection offered by the Directive - articles 10 and 11 in particular (non-discrimination and prohibition of exclusive arrangements) may not be sufficient - and crossing the line of general competition law, arguably may require further protection (dominant position, abuse, affecting European trade etc.).

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<sup>1</sup> The lobby brought forward a number of arguments why CHI should be left alone, including:

1. the rather hazy structure and ownership of many holders of CHI; it would become very hard to assess whether the content holder would qualify as a public sector body.
2. disallowing the content holders of CHI to exploit their PSI would lead to their bankruptcy, as they are heavily relying on this source of income;
3. the rather 'layered' situation as to intellectual property rights, where in many cases various authors have been involved in the production of the copyrighted works. This would make the application of the Directive rather burdensome.

### **The review - it is now or never**

Under Article 13 of the Directive, the European Commission will carry out a review of the application of the Directive, in which it will address inter alia the scope and impact of the Directive.

1. The Commission shall carry out a review of the application of this Directive before 1 July 2008 and shall communicate the results of this review, together with any proposals for modifications of the Directive, to the European Parliament and the Council.
2. The review shall in particular address the scope and impact of this Directive, including the extent of the increase in re-use of public sector documents, the effects of the principles applied to charging and the re-use of official texts of a legislative and administrative nature, as well as further possibilities of improving the proper functioning of the internal market and the development of the European content industry.

This review is now under preparation and will need to be finalized before 1 July 2008. Therefore, the review represents an important political milestone: either the opportunity is taken to address shortcomings, or it may take many years to bring the issue back on the political agenda.

### **The right choice? - the market holds the answers**

The Directive is in many ways a competition measure: it aims to create a level playing field for re-users of PSI, compelling the public sector to apply transparent, fair and equal conditions for comparable sorts of re-use. As such it encourages the private sector - rather than the public sector! - to exercise their legitimate rights to exploit PSI and to seek redress for any misconduct. Where the Directive is actually shaking up - and shaping up - the value chain in other important PSI sectors, such as geographical information, legal information, statistical information, meteorological information, the value chains in the CHI sector have remained untouched. Perhaps re-users in the CHI sector should provide the yard stick. If they are able to exploit the public sources they need, without facing the impediments re-users have been (and still are) dealing with in the other PSI arenas, then this chapter should be closed. However, if that is not the case, there is a legitimate question whether the current position is the right one, and, if not, what policy actions could be taken to address this.

### **Addressing the problem? - the focal point of the Cyprus meeting**

This meeting aims to provide an important platform for this discussion and for scoping the issues involved, pulling together important stakeholders and experts in the field of (exploitation) of CHI. Through an intensive, highly interactive dialogue it seeks to:

1. allow for and stimulate debate among players within the respective value chains of CHI
2. assess eventual needs for any (European) measures, including regulation, as to exploitation of CHI
3. contribute to a set of recommendations in the light of the Review of the PSI Directive

### **Conclusions**

The conclusions of this meeting will be summarized in a separate report and a condensed version will inform the recommendations which the ePSIplus project team will submit to the European Commission in advance of the review. Both documents will be published on the ePSIplus web portal. The final report will be presented along with those related to the other ePSIplus thematic priority areas at the ePSIplus Conference scheduled to take place in the spring of 2008.