

COPYRIGHT AND (OPEN) LICENSING IN THE DIGITAL HUMANITIES

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Ethics and Legality in the
Digital Arts and Humanities

- “aims to address the needs of the research & education community in our target area directly and - among other objectives - produce recommendations, training and information materials etc.”
- DARIAH-EU Working Group with colleagues from 18 countries
- ELDAH Blog: <https://eldah.hypotheses.org/>
- Core Interests:
 - Intellectual Property Rights and (Open) Licensing
 - Data Protection and Privacy
 - Research Ethics and Scholarly Conduct

AGENDA

This session will ...

- (1) provide a very basic introduction to legal terms and issues regarding copyright and publication,
- (2) explain how open licenses work and how they can help in making our work more visible and accessible,
- (3) showcase some of the most prominent open licensing tools aimed at scholars with no legal background,
- (4) take a look at the new EU Directive for Copyright in the Digital Single Market.

OPEN LICENSING

- WHY?
- HOW?

INTELLECTUAL PROPERTY RIGHTS



Image Rights: Fusion Law School (<http://www.fusionlawschool.com/courses>)

“The ability to use copyrighted materials for illustration in class and for scientific research [...] is in itself a matter of course!”

- Rainer Kuhlen: *Eine Kopernikanische Wende im Publikationssystem* (2007)

A FUNDAMENTAL HUMAN RIGHT ...

Universal Declaration of Human Rights, Article 27

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

JANUS HEAD OF SCHOLARSHIP ...

- (1) Scholars are (re-)users of others' works

- (1) Scholars are creators of works



https://commons.wikimedia.org/wiki/File:Janus_coin.png

“Intellectual property is the legal form of the information age: all the more reason that it should not just be a matter for lawyers.”

- James Boyle: Shamans, Software, and Spleens (1996)

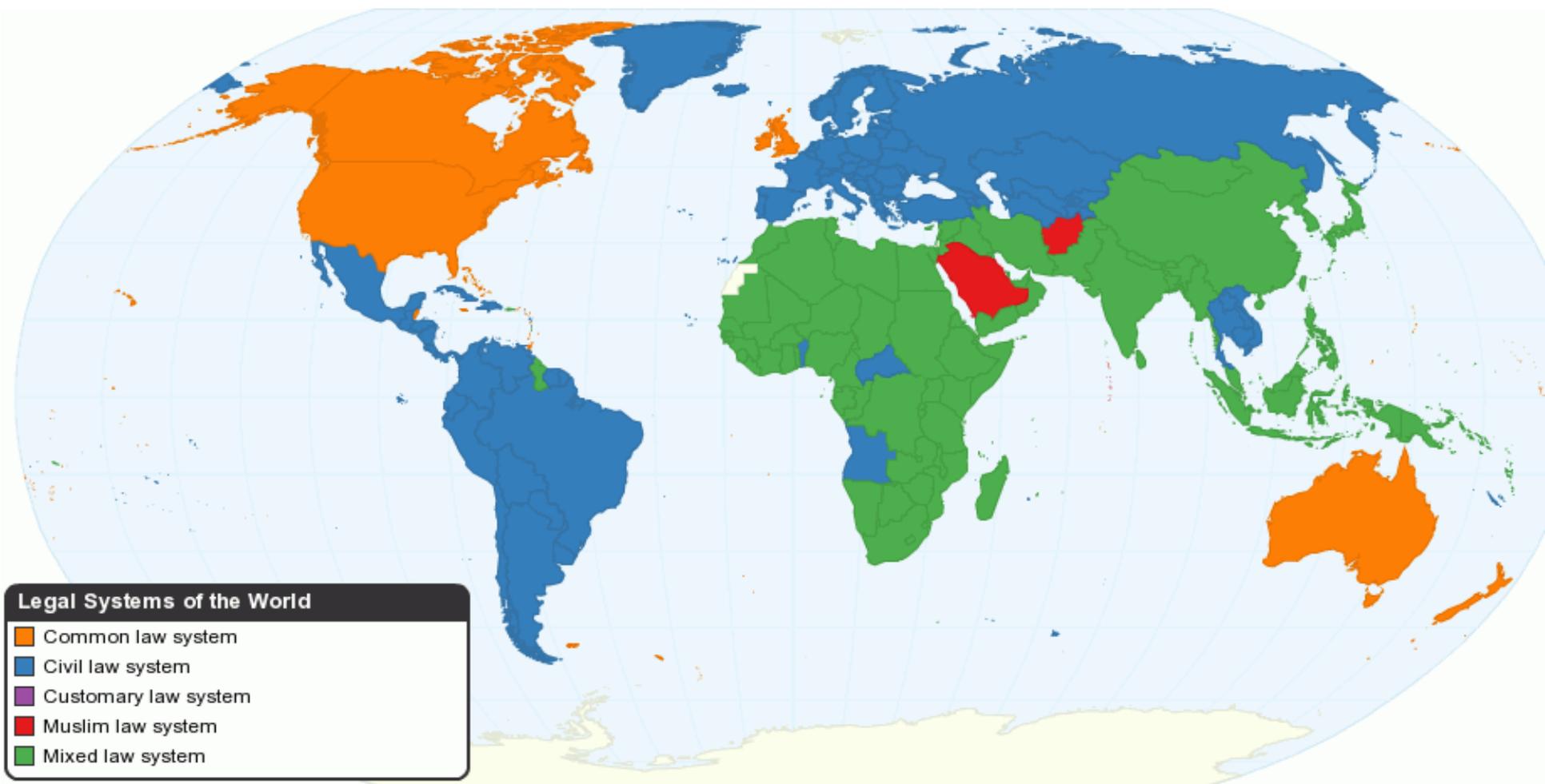
FUNDAMENTAL ISSUE:

LACK OF APPROPRIATE LEGISLATION

- (1) Wide support for free use of protected works for (non-commercial) education and research
 - UNESCO OER Guidelines
 - EU Digital Agenda for Europe
 - Open Access (and increasingly Open Data) obligation in National and EU Funding agencies/schemes

- (1) Legislation does not reflect this
 - International treaties have less value than national laws
> territoriality principle
 - Different legal systems (Common Law vs. Civil Law)
 - Heterogenic definitions and provisions ("use")

LEGAL SYSTEMS



LEGAL SYSTEMS

Common Law (“case law“)

- United States, United Kingdom and (former) Commonwealth, Countries
- Utilitarianism: promoting progress and competition (widest possible variety of goods at lowest possible price)
- Primacy of Judge’s decisions (case law)
- Copyright (Copy-Right = “right to copy”)

Civil Law (“statutory law”)

- (Continental) Europe, Latin America, Central Africa
- Natural Rights: certain rights are inherent in human reason and/or human nature
- Primacy of legislation (legal codex)
- Author’s right / droit d’auteur / Urheber-Recht

MAJOR DIFFERENCES

Common Law

- Author can transfer or waive all his rights
- Work for Hire
- (usually) no “Neighboring Rights”
- *Fair Use* (Common Law) as socially and culturally valuable right

Civil Law

- Personality Rights (authorship, naming) are natural and not transferable
- Owner is always a natural person and the original creator
- Work must carry “imprint of author’s personality”, otherwise distinct Neighboring Rights (e.g. for “machine-made” or performer’s works)
- *Statutory Licenses* (Civil Law) define exceptions that are required to be clearly defined and narrow in scope and reach

COMMON PRINCIPLES OF IPR

“Work”

- Original literary and artistic works
- Expressions, not ideas, are protected

Territoriality principle

- National law stops at border
- Apply law of the place where the infringement happened

INTERNATIONAL COMMON GROUND

- **Berne Convention 1886 (Paris Act 1971)**
 - IPR do not require registration (happens at creation)
 - Limited duration of copyright (minimum of 50 years pma)
 - Quotation
- **Universal Copyright Convention 1952**
- **TRIPS 1994**
 - **Three Steps Test:** permits reproduction ...
 - “in certain special cases”
 - “if it does not conflict with normal exploitation of the work”
 - “and does not unreasonably prejudice legitimate interests”
- **WIPO 1996**
 - “*making available to the public*”
 - Certain liberties for education/private study

COMMON PRINCIPLES IN EUROPE

work

- “original” or “creative” expression (“personality of creator”)

author

- natural person
- actual creator

attributes

- duration: 70 years p.m.a
- no registration necessary, right manifests at creation
- distinction between moral rights and economic rights

exceptions

- right to private use (non-commercial, individual): “home-copy”
- citation (scientific, criticism, news, caricature)
- non-commercial, closed circle presentation (not necessarily making available!) for education and research

WORK: ORIGINAL INTELLECTUAL CREATION

- **original** = individual, distinct (“creator’s personality must be recognizable”)
- **intellectual** = mental product (“creator must have had an intention”)
- **creation** = not the idea, but the physical expression of the idea is protected! The idea must have been expressed /given form.

Work \neq Artwork

AUTHOR = ORIGINAL CREATOR



Always a **natural person**

- Not an institution (legal person)
- “work for hire”?

Exclusive rights holder

- Moral Rights
- Exploitation Rights

MORAL RIGHTS

No waiver possible!

- Protection of **Authorship**
- Protection of **Designation**
- Protection of **Integrity** of the Work

> in **Common Law (US/UK)**:

Work for Hire / Copyright Waiver / Public Domain

EXPLOITATION RIGHTS

EXAMPLE: AUSTRIA

- Adaptation, edition and translation
- **Reproduction**
- Distribution
- Broadcasting
- Performance and demonstration
- **Making available (to the public)**

> in Common Law (US/UK): “use” > “fair use”

REPRODUCTION (EU INFOsoc DIRECTIVE)

Member States shall provide for the **exclusive right** to authorise or prohibit **direct or indirect, temporary or permanent reproduction** by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts [...].

MAKING AVAILABLE (EU INFOsoc DIRECTIVE)

Member States shall provide authors with the **exclusive right to authorise or prohibit any communication to the public of their works**, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

SHOWCASE A: DIGITIZATION

Digitization requires

- Reproduction
- Making Available

Author has exclusive right

Free Licenses / mandatory exceptions?

Right to digitize?

Art 5 InfoSoc-Directive

Member States **may provide** for exceptions or limitations to the **reproduction right** provided for the following cases: [...]

(b) in respect of **reproductions on any medium** made by a **natural person for private use** and for ends that are neither directly nor indirectly **commercial**, on condition that the rightholders receive **fair compensation** which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subjectmatter concerned;

(c) in respect of specific acts of **reproduction** made by publicly accessible **libraries, educational establishments or museums, or by archives**, which are not for direct or indirect **economic or commercial** advantage;

Right to make available?

Art 5 InfoSoc-
Directive

Member States may provide for exceptions or limitations to the **rights provided for in Articles 2 and 3** in the following cases: [...]

(n) use by **communication or making available**, for the purpose of **research or private study**, to **individual members of the public** by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their **collections**;

DIGITIZATION AS AN OBLIGATION?

Directive on the Re-Use of Public Sector Information (2013/37/EU)

- “a clear obligation [...] to make all documents re-usable”
- “public sector bodies” (libraries, including university libraries, museums and archives)
- “in open and machine-readable format”, with their metadata
- charges “limited to the marginal costs incurred for their reproduction, provision and dissemination” (... regarding “earning money”)

DIGITIZATION MAY CREATE A RIGHT

- First step is always a **reproduction** (may reproduction be made in the first place?)
- the digitization itself may be
 - just a reproduction of an existing work
 - protected by *neighboring rights* as a **photograph**, dependent on the complexity of technology and/or required expertise!
 - or even a **work of fine arts** if there is enough individuality involved
- **ownership** of the digital copy: institution or creator?

SHOWCASE B: *MAKING AVAILABLE* IN EDUCATION

i.e. using articles and/or other protected works, e.g. on an E-Learning platform:

USA: “fair use of a copyrighted work [...] for purposes such as criticism, comment, news reporting, *teaching (including multiple copies for classroom use), scholarship, or research*”

UK: “for the purpose of, or associated with, *an approved course of study or research by an enrolled external student of an educational institution.*”

D: making available small parts, by way of illustration for non-commercial educational purposes, for a clearly defined circle.

PT: reproduction, communication and making available for educational purposes of parts of published works, without commercial advantage

F: “représentation ou reproduction *d'extraits d'oeuvres* [...] à des fins *exclusives d'illustration* [...] composé majoritairement d'élèves, d'étudiants, d'enseignants ou de chercheurs directement concernés [...] *compensée par une rémunération*”

SHOWCASE C: MAKING AVAILABLE IN RESEARCH

i.e. using articles and/or other protected works on a personal academic Blog, in a digital online edition, with colleagues on a wb-drive, etcetera:

USA: “fair use of a copyrighted work [...] for purposes such as [...] scholarship, *or research*, is not an infringement of copyright.”

UK: “*for research* and private study, criticism, review, and news reporting”

D: making available small parts *for a clearly defined circle for their own personal non-commercial research*

A: reproduction for own research ... NOT making available for collaboration, except as quotation!

PT: same as A!

NL: reproduction and presentation in closed circle, for non-commercial purpose, by public institution, for scientific purpose

BE: partial reproduction for purposes of illustration for teaching or scientific research

SHOWCASE D: ORPHAN WORKS

Works which are inside the protection period for IP without a known creator (... up to 40% of material in British Library!)

- **USA:** Anonymous Works protected 95 years after publication or 120 years after creation, no legal framework beyond fair use
- **UK:**
 - **Diligent search** (“consulting the appropriate sources for the category of works“)
 - **Non-commercial use**
 - Facilitate Digitization at **cultural institutions** for making cultural heritage available to the public

SHOWCASE D: ORPHAN WORKS

EU Directive 2012/28/EU

- “Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage [...] are engaged in large-scale digitisation of their collections or archives in order to create European Digital Libraries. They contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. [...]
- “to reproduce and make available to the public”
- “A work [...] which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States.”
- “[...] may generate revenues in the course of such uses, for the exclusive purpose of covering their costs[...]

THERE'S A LIGHT ...

EU Digital Agenda for Europe

- EU Directives (Information, PSI, Orphan Works)
- Green Paper “Copyright in the Knowledge Economy”, COM(2008) 466/3
- FP7 pilot OpenAIRE (Open Access Infrastructure for Research in Europe: www.openaire.eu)
- Commission communication “Towards a modern, more European copyright framework”, COM (2015) 626
- Commission proposal for a Directive on “Copyright in the Digital Single Market” COM (2016) 593
- Directive (EU) 2019/790 on Copyright and related rights in the Digital Single Market

Open Science

- Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003)
- Open Data/Open Access obligation by national funding agencies (Horizon2020, DFG, FWF, SWF, RCUK, US Memorandum)
- Open Educational Resources: UNESCO recommendations

LICENSING



Image Rights: Exceed IT Services (<http://www.exceedgulf.com/site/index.php/services/licensing/>)

OPEN MEANS ...

- no limitations on access of any kind!
- no cost, no authentication, no national or institutional privileges
- Language?

Reasoning: Knowledge funded by (i.e. produced under a mandate from) the public must benefit the public without any limitations

OPENNESS

- DH makes extensive use of **non-traditional forms of publication** (papers, monographies) > open in a much broader sense
- **Open Data**: free and public access to and availability of data
- **Open Source**: free and public access to and availability of code
- **Open Science**: ideal incorporating Open Access, Open Source and Open Data, but moves above and beyond that by making the entire research process public and transparent (Open Methodology, Open Peer Review etc.)

PRINCIPLES

What can be licensed?

- any “works“
- ... to which you own the rights
- ... taking into account (exclusive) publishing contracts, work contracts, co-authors!

What cannot be licensed?

- public domain works
- raw data (usually not “work”: originality and individual creation)

PRINCIPLES

“A license is a formalized promise not to sue!”
- Pawel Kamocki

- Only the rights holder can license!
- Common categories:
 - attribution
 - re-use
 - non-commercial
- Public Domain Mark
 - < <https://creativecommons.org/choose/mark/?lang=de> >

LICENSING TOOLS

- Creative Commons

<http://creativecommons.org/>

- Europeana Available Rights Statement

<https://pro.europeana.eu/page/available-rights-statements>

<http://rightsstatements.org/page/1.0/?language=en>

- CLARIN LINDAT License Selector

<https://ufal.github.io/public-license-selector/>

CREATIVE COMMONS

The screenshot shows the Creative Commons website interface. At the top is a green navigation bar with the Creative Commons logo and links for About, Licenses, Public Domain, Support CC, Projects, and Blog. Below this is an orange banner with the text "Keep the internet creative, free and open." and a dark brown button that says "Donate to Creative Commons".

The main content area features a central text block with links: "New to Creative Commons? [Considerations before licensing] [How the licenses work]", "Explore the Creative Commons licenses. [Want public domain instead?]", and "[Looking for earlier license versions, including ports?]".

Two panels are shown side-by-side. The left panel, titled "License Features", contains the following text and options:

Your choices on this panel will update the other panels on this page.

Allow adaptations of your work to be shared?

Yes No

Yes, as long as others share alike

Allow commercial uses of your work?

Yes No

The right panel, titled "Selected License", shows the "Attribution 4.0 International" license. It features the CC logo and the person icon (BY). Below the icons, it states "This is a Free Culture License!" and includes a circular seal that says "Free Cultural Works APPROVED FOR".

CREATIVE COMMONS

<http://www.creativecommons.org/>

- **Commons** are resources (cultural, natural) that should be freely available and accessible to **all members of society** – they are not owned individually but a common good.
- “Creative Commons helps you **share your knowledge and creativity** with the world.”
- “universal access to research and education and full participation in culture for a new era of development growth, and productivity.”
- for licensing “creative content”
- since 2001
- current version 4.0 (up to 3.0: national versions)

CREATIVE COMMONS LICENSES



[by]

attribution



[by sa]

attribution – share alike



[by nd]

attribution – no derivatives



[by nc]

attribution – non-commercial



[by nc sa]

attribution – non-commercial – share alike



[by nc nd]

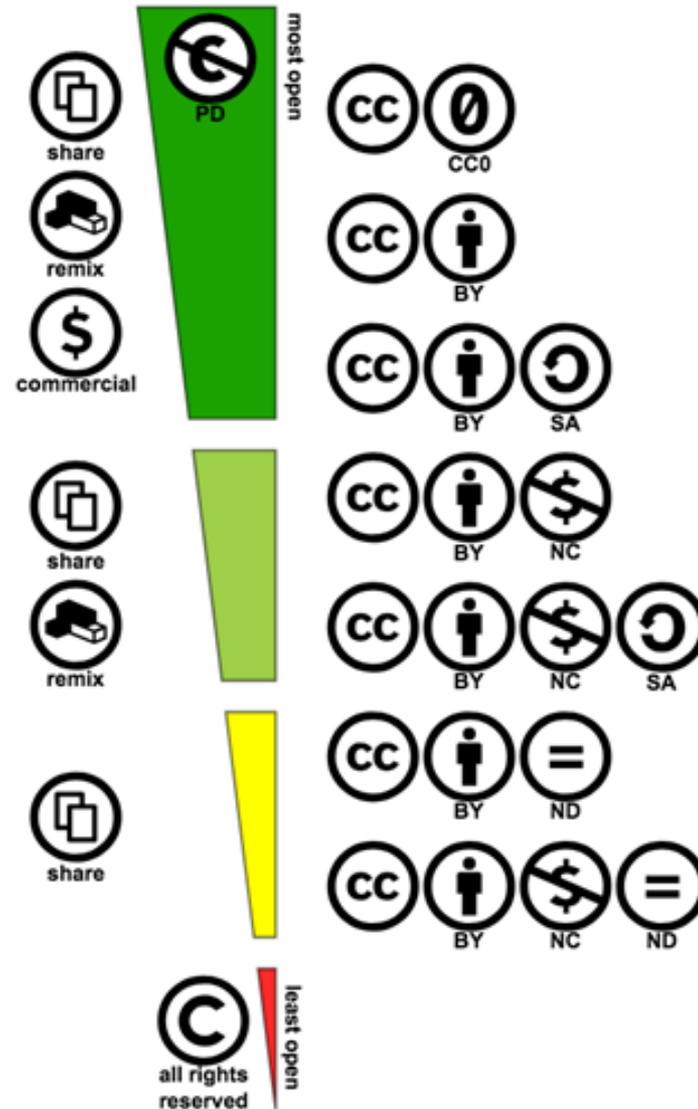
attribution – non-commercial – no derivatives



[0]

no rights attached (~ public domain)

CREATIVE COMMONS LICENSES



THE THING WITH CC0 ...



= complete waiver by the rights holder (~ **Public Domain**)

- In continental European law: **not applicable!**
No waiver of **moral rights** possible (just exploitation rights)
- CC0 License **does** provide for this (*"Should any part of the Waiver for any reason be judged legally invalid or ineffective under applicable law, then the Waiver shall be preserved to the maximum extent permitted"*), which produces legal insecurity and transfers responsibility to the user
- Use **CC-BY** instead!

HOW DOES IT WORK?

- Visibility through inclusion of **icon**
- **Hyperlink** pointing towards the full license text
 - in human-readable text
 - in RDF/XML
- Use of specific *Rights Expression Languages*
 - METS
 - MPEG-21

EUROPEANA RIGHTS STATEMENT

Posted on Friday February 6, 2015

[Legal standards](#) [Cultural Heritage Institutions](#) [rightsstatements.org](#)

Available rights statements

Rights statements express the copyright status of a Digital Object, as well as information about how you can access and re-use the objects. Europeana supports 14 rights statements.

Before you get started

Before you apply rights statements, you should know:

- The list of available rights statements will be updated from time to time. Read: [Change log for pro.europeana.eu /available-rights-statements](#)
- All Creative Commons licences and legal tools can only be applied by, or with the permission, from the rights holder.

CLARIN LINDAT LICENSE SELECTOR

Choose a License

Answer the questions or use the search to find the license you want

What do you want to deposit?

Search for a license...

Public Domain Mark (PD)

The work identified as being free of known restrictions under copyright law, including all related and neighboring rights.

Publicly Available 

Public Domain Dedication (CC Zero)

CC Zero enables scientists, educators, artists and other creators and owners of copyright- or database-protected content to waive those interests in their works and thereby place them as completely as possible in the public domain, so that others may freely build upon, enhance and reuse the works for any purposes without restriction under copyright or database law.

EU DIRECTIVE 2019

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on **Copyright and related rights in the Digital Single Market** and amending Directives 96/9/EC and 2001/29/EC
<http://data.europa.eu/eli/dir/2019/790/oj>

RESEARCH EXCEPTION (ART. 3)

- exceptions [...] for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access
- shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results
- Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases [but] shall not go beyond what is necessary

TEXT AND DATA MINING (ART. 4)

- exceptions [...] for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining
- may be retained for as long as is necessary for the purposes of text and data mining
- on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.

DIGITAL AND CROSS-BORDER TEACHING (ART. 5)

- exceptions [...] in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use
 - takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment
 - Is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

THE GOOD, THE BAD AND THE UGLY

- Reproduction for the preservation of cultural heritage (Art. 6)
- Use of out-of-commerce works by cultural heritage institutions (Art. 8)
- Collective Licensing (Art. 12)
- Works of Visual Art in Public Domain (Art. 14)
... 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.

PROTECTION OF PRESS PUBLICATIONS (ART. 15)

- shall not apply to private or non-commercial uses of press publications by individual users
- shall not apply to acts of hyperlinking
- shall not apply in respect of the use of individual words or very short extracts of a press publication

USE OF PROTECTED CONTENT BY ONLINE CONTENT-SHARING SERVICE PROVIDERS (ART. 17)

- An online content-sharing service provider shall therefore obtain an authorisation from the rightholders [...] in order to communicate to the public or make available to the public
- the limitation of liability established in [Article 14\(1\) of Directive 2000/31/EC](#) shall not apply
- ensure exceptions for quotation, criticism, review, caricature
- “The application of this Article shall not lead to any general monitoring obligation”

READING

- **Darling, Kate:** “Contracting About the Future: Copyright and New Media.” *Northwestern Journal of Technology and Intellectual Property* 10/7 (2012): 485–530.
<http://scholarlycommons.law.northwestern.edu/njtip/vol10/iss7/3>
- **Klimpel, Paul:** Free knowledge thanks to creative commons licenses. Why a non-commercial clause often won't serve your needs, 2013.
https://www.wikimedia.de/w/images/homepage/1/15/CC-NC_Leitfaden_2013_engl.pdf
- **Kamocki, Pawel & Ketzan, Erik:** Creative Commons and Language Resources, 2014.
https://www.clarin-d.net/images/legal/CLIC_white_paper_1.pdf
- **Klimpel, Paul (et al.):** Neue rechtliche Rahmenbedingungen für Digitalisierungsprojekte von Gedächtnisinstitutionen, 2017.
https://www.digis-berlin.de/wp-content/uploads/2017/11/Handreichung_Recht_2017_NEU_Web.pdf
- **Maier, Philipp:** Digitization of Cultural Heritage: Copyright Guidelines, 2018.
<https://gams.uni-graz.at/o:coop-digitization>
- **Stodden, Victoria:** “The legal framework for reproducible scientific research: Licensing and copyright.” *IEEE Computing in Science and Engineering* 11/1 (2009): 35–40.
<https://web.stanford.edu/~vcs/papers/Legal-STODDEN2009.pdf>

THANK YOU
&
HAPPY SHARING!

