



## CEPIC & BAPLA Response to EUIPO Out-of-Commerce Works Consultation

CEPIC and BAPLA welcome the opportunity to respond to the consultation on the Out of Commerce Portal High Level Specification.

The photo industry is a vibrant marketplace for licensing images of all types, including those from archives, for a variety of uses in print and online. Arguably, an image displayed on an image library website is always 'in commerce', and an image library, archive, or agency is established purely to license images it represents.

Our experience so far of national implementation of works held by CHIs, which can serve as a useful example is with the UK's Orphan Works (OWs) licensing system and stakeholder involvement in Extended Collective Licensing (ECL), which lends well to the framework of setting up an OCCW database. In both situations rightsholders were involved at every level and placed at the centre of implemented processes to ensure transparency and parity to any systems introduced. The [UK OW system](#) included crucial steps such as a process for diligent search, small-sized visual thumbnails of works, and clear procedures for the application process including an appeals process and guidance for rightsholders to claim remuneration within a particular time period. ECL discussions highlighted the importance of a database, or registry, of opted-out rightsholders to be kept up to date. No process is infallible, but the effort to ensure rightsholders were engaged and considered from the outset should be noted.

1. Identifying photographs – for an industry where there are no unique identifiers, and metadata can be striped, image thumbnails are the best identifier.

Our recommendation would be to have an OCCWs database that incorporated not only text-based information, but where images are recorded to include low-resolution thumbnails. The best way of ensuring that the image is searchable by rightsholders is the inclusion of a thumbnail of the image which can be searched by image recognition technology.

There are two categories of images to consider when assessing OCCW status: stand-alone images and embedded images in works. Stand-alone images (with known rightsholders and dates & therefore not OWs) can be scanned digitally for preservation purposes, and a thumbnail produced and uploaded to a register database, as the image is assuredly the best identifier. For embedded images it can be more challenging to establish whether an image is 'in commerce' when it features in a published work, as it will depend on whether the publication or work has clearly marked or credited the copyright holder.

International standard codes include ISBNs, ISSNs, ISTCs, ISNIs, barcodes, etc. Unlike book or magazine publishing industries, the photo industry does not have uniform unique identifiers such as ISBNs or ISSNs.

Aside from image numbers issued by rightsholders, metadata and thumbnails are the most common form of image identification. The [IPTC Photo Metadata](#) sets the industry standard for administrative, descriptive, and copyright information about images. It is essential for [managing digital assets](#). However, a perpetual issue that pervades image use is the mechanical stripping of metadata by



certain systems, including software programmes processing images to upload to online platforms and a range of online platforms - see IPTC's [Social Media Sites Photo Metadata Test Results 2019](#) as an example.

Thumbnails enable both CHIs and rightsholders to check and query the status of the OOCW using image recognition tools (IRTs), which are now ubiquitous, and can be checked via API. Having digitised thumbnails allows for IRTs and API technology to be used as a tool for verification. There however must be a diligent search procedure that supersedes image status, and a clear form of redress if images are incorrectly labelled as an OOCW.

2. The application of image recognition technology and how thumbnails could be searched by right holders.

Image recognition technology is 'open source software' that is able to identify and classify elements in an image - it is key to navigating information-heavy databases. It works by setting up a neural network that processes pixels - which make up an image, by presenting the network with images so that the network can learn and recognise images both within and beyond its database.

Image recognition technologies are able to identify image thumbnail details - streamlining the process of recognition, categorisation, and understanding. Combining it with search criterion, using either an image or URL, the customised programme can show where the image has been used on the web, finding similar ones at the same time (one reason why tech firms like Google and Amazon also use this technology). The software offers various possibilities that are harnessed by different online entities. The most efficient approach is when you combine the "exact match" algorithms with "similar" algorithms; this approach is recommended by the image industry - it provides good results because the data contained in the exact match image could be used to find closed similars by computing the distance between fingerprints.

Image recognition tools can be applied to content management databases in order to recognise, analyse, and interpret images. The technology is highly efficient and can sort through countless images, returning data that is uniquely applicable to a database, providing multiple automated options for sorting, organising, and displaying images based on category, colour, tag - which can also be automated - or custom input.

Visual recognition can be used for identifying content in 'PDFs'. If scans of OOCWs books, magazines and periodicals are available as PDFs it is also possible to search with image recognition technology directly on the PDF, which the EUIPO may want to consider.

The use of thumbnails (approx. 400x600 pixels is ample) means a database can house millions of images for the fraction of the cost but still be used as identifiers for a collection. There are many image recognition software applications and numerous options. If a neural network and machine learning techniques are combined, it is possible to have a near perfect visual recognition system that gives accurate results. In addition, advances in technology means that invisible watermarking can assist with preventing image data being stripped from CHI's hosting OOCWs images on their websites.



### 3. Treatment of embedded works, in particular embedded photographs:

- Photographs continue to be in commerce even if a book is not.

An OCC image should include the visual reference and the description of the photo (metadata) plus reference to the book it was published on. Photographs are commercially timeless – digital photography has fuelled this longevity, which image libraries, archives and agencies have harnessed over decades.

If a book or magazine publisher decides to illustrate a commemoration or anniversary, or feature a specialist rare old subject, they can licence photographs from decades old collections. For example, a Photography History book may not be commercially available by the same publisher, but the historical images featured are likely to be published in another version by other publishers (see examples featured on [Amazon](#)). It is the key reason the photo industry endures – photographs are continually licensed and re-licensed beyond publications they first appear in. Furthermore, cultural heritage organisations house photo libraries, many of which are set up for commercial purposes in order to support revenue generation.

- In order to ensure that embedded photographs are not deemed, en masse, to be OOC, embedded photographs must be clearly identified via metadata at the very least, and ideally by thumbnails.

Metadata is an indispensable element of image identification added by all rightsholders to commercial images, as it allows for the searchability of an image on an internal or external system. However, as it is 'not' immutable, it must be accompanied by low resolution thumbnails. Nowadays, navigating through databases using thumbnails is effortless, accessible and machine-readable.

### 4. Treatment of sets of work, as above. The concept of the sets of works needs to be clarified.

It is understandable that 'sets of works' can require effort to check every item, however we strongly disagree that the impact on labelling a set of OOCWs would be negligible, particularly where works feature photographs either as stand-alone or embedded in works. No full impact assessment was undertaken to see what the impact would have on rightsholders of particular sectors, such as the photo industry. Therefore we have no clear analysis to scrutinise.

However the photo industry has billions of photographs commercially available, therefore we would like to recommend the following:

- A diligent search, setting out parameters to ensure a set or works would be eligible for an OOCW licence;
- Metadata, tagging and thumbnails must be mandatory;
- 'Opting-out' of the database – at the moment there is no mention of the ability for a rightsholder to opt-out and have the registry recorded as such;
- The right to reversion, if an image is identified as 'in commerce' - if a work or embedded work is wrongly labelled OOC, it should be removed from EUIPO database within 30 days;
- The right to remuneration within a set period of time – we recommend 10 years, without the need of a rightsholder to become a member of a CMO;



- agree a protocol for good practice and appropriate training of staff to respond to rightholders requests.

### **Final Comments**

We remain concerned that the legislative mechanisms being proposed to enable the delivery of cultural value may unintentionally undermine the economic value of an active and lively market by introduction blanket ECL licensing at national discretions, if there is no clear oversight given to rightholders (both nationally and internationally). There is considerable risk that the proposed 'solutions' may create confusion over the fundamental principles of consent (particularly for non-members of a CMO) and lack of parity across European nations, which would damage ability to drive economic growth across our European market.

It is important to note that museums and galleries also participate in the image licensing marketplace, and that revenue derived from this activity is increasingly relevant to sustaining their public service activities.

The economic effect of using an OCCW status for visual works, such as photographs where there are traceable rights holders amongst non-traceable, needs to be considered and not ignored over the costs of the mass digitisation of works for future access.

An essential consideration must be respect for the 'moral rights' of a rightholder, and as such careful assessment of a work and its intended uses must be accounted for. Our members exercise professional judgement, based on extensive experience and expertise working with photographers in our industry. The concern would therefore be the exploitation by third party users who, by the terms and conditions set in either contractual terms for digitisation or licensing terms, create a de facto exclusive license over the OCCWs, especially if a rightholder comes forward to claim back their works.

Furthermore, a crucial matter is the onus to track these classified works, and where possible exercise 'opt-out' options, falls on the shoulders of rightholders. Therefore it is critical that rightholders represented by their trade organisations, and not merely CMOs, are principally involved in the shaping of any central database held by the EUIPO and during the drafting of any proposals for national legislation and schemes.

We hope that due consideration of the involvement of both our European and national trade organisations when developing national laws and schemes is observed; and that newly proposed laws do not contradict or lessen the rights of rightholders in their ability to exploit their own images – which we believe is paramount.

### **About CEPIC**

**CEPIC** represents hundreds of Picture Libraries and Agencies representing hundreds of thousands of photographers whose core business is the direct licensing of visual content off-line and online. Acting as right holders, Picture Libraries and Agencies license digital asset for all kinds of commercial uses, to newspapers, magazines, advertising, broadcasters, etc. CEPIC members are continuously adaptive



towards innovative technology solutions for the growth in digital enterprises and have developed sophisticated digital platforms to both market digital content online and provide digital access to images.

Amongst CEPIC members are global players such as Getty Images, Magnum Photos and Alamy, fine arts libraries such as Bridgeman Images, historical archives such as Roger-Viollet and Fratelli Alinari, news photo syndication such as Le Figaro, news agencies such as Belga, TT and DPA as well as representatives for European trade associations AEAPAF, BAPLA, BLF, BVPA, SAB, and SNAPIG.

### **About BAPLA**

**BAPLA** members provide a 'vital economic link' for many professional photographers, supporting their ability to derive income and reinvest in their creativity. Founded in 1975, BAPLA is the UK trade association for picture libraries and agencies representing members of a unique area of the creative industry. We have a broad and diverse membership of image rights holders and purveyors, from sole traders to major news, stock and production agencies, as well as SMEs, archives and cultural heritage institutions.

Our members are the main source of licensed images you see every day in print and digital media, and as such have contributed to the UK and European economy for over 40 years. BAPLA members generate revenue for, and manage the interests of over 120,000 creators and rights holders, encompassing a breadth of experienced and new young image-makers across Europe. Licensing online is the significant driver of the image industry.

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