

Guide to the European Commission Survey Reviewing the DSM Directive

Survey: <https://horizons.confirmit.eu/wix/p181452076573.aspx>

The survey looks complex, but much of this comes from the wide range of different rightholders that have been included as groups, and exhaustive treatment of a number of issues, in particular around rights reversion. In contrast, the survey does not even bother including researchers, educators, students or consumers as categories of respondents.

In order to establish how and when your country implemented the provisions of the DSM Directive, you may want to look at Communia's [Eurovision](#) webpage, the University of Glasgow's [Copyright Flexibilities project](#), or copyrightexceptions.eu.

Question	Notes
General Question	
<p>Q1. In your experience, to what extent has the DSM Directive improved the following (significantly improved, somewhat improved, no change, somewhat deteriorated, significantly deteriorated, I don't know):</p> <ul style="list-style-type: none">a) Digital access to content across bordersb) Legal certainty for the use of copyright-protected content in teachingc) Legal certainty for text and data mining activitiesd) Use of digital content by cultural heritage institutions	<p>Draw on your own experience, reflecting on how things have changed since your government took measures to implement the Directive.</p> <p>In providing responses, you may want to consider:</p> <ul style="list-style-type: none">• The effectiveness of measures intended to facilitate access and use (for TDM, education, preservation and providing access) – have the changes offered you more possibilities than you had before, or has nothing really changed?• The impact of the greater 'clarity' brought by implementations which risks leading to a restriction of possibilities (for example the limitation of text and data mining to non-commercial situations, the possibility to oblige licensing of content for

education, the limitation of preservation to materials in permanent collections, the idea that a 'sufficiently representative' collective management organisation can decide whether to license out of commerce works or not).

Overall, the assumption is that access to content has likely not been significantly affected when it comes to libraries, given that there is no explicit possibility for cross-border document supply, that the cross-border teaching exception does not apply to libraries a priori, that text-and-data mining has been subject to aggressive efforts by rightholders to shut things down, and that the mechanism in place for sharing out-of-commerce works leaves too much room for CMOs to decide not to licence (and so has not really led to any meaningful change since the situation before).

Text and data mining (TDM) (Research Organisations, CHIs)

Use of TDM, educational and preservation exceptions (Articles 3–6). For the next few questions please note that the Directive provides for an exception for text and data mining activities conducted for the purposes of scientific research (Article 3) and a general text and data mining exception (Article 4). Rightholders may reserve their rights and exclude their content from the scope of the latter exception.

Q2. Have you relied on the TDM exception for scientific research purposes (Article 3)? (Yes, No, I don't know)

You will need to answer based on your institution's experience.

<p>Q3. To what extent does the TDM exception for scientific research purposes meet your needs? (To a great extent, To some extent, To a little extent, Not at all, I don't know).</p> <p>Q3_1 [If Q3=1,2,3,4] Can you please elaborate on your response?</p>	<p>You will need to answer based on your institution's experience.</p> <p>It is worth noting that the limitation of the exception effectively to purely non-commercial situations is likely to restrict its effectiveness. There have also been the negative impacts of a lack of clarity around which laws apply (for example, can researchers use materials accessed under licences under foreign laws), as well as actions by publishers to claim that TDM is not legal, or that the rules do not allow use for AI. In some countries, heritage institutions have therefore been very cautious to allow any use of in-copyright collections for public AI purposes. Furthermore, restrictive rules around the subsequent storage of data can also make the exception less useful.</p>
<p>Q4. Have you relied on the general TDM exception (Article 4) for your activities? (Yes, No, I don't know)</p>	<p>You will need to answer based on your institution's experience. If your institution is involved in public-private partnerships, or collaboration with others (such as hospitals and others) then this may be the case.</p> <p>You should also bear in mind if you have engaged in projects such as training Transkribus or other OCR-models, or Named-Entity-Recognition - these are examples of projects that imply TDM.</p>
<p>Q5. To what extent does the general TDM exception meet your needs? (To a great extent, To some extent, To a little extent, Not at all, I don't know)</p> <p>Q5_1 [If Q5=1,2,3,4] Can you please elaborate on your response?</p>	<p>In responding here, you will want to reflect on how far opt-outs by rightholders restrict the volume, quality and type of content that can be used for TDM, as well as the broader impact of concerns about liability and more. Has it been clear how opt-outs work, and so which materials you may or may not use?</p>

<p>Q6. Have you relied on the TDM exceptions in activities related to the development of large language models / AI models? (Yes, No, I don't know)</p> <p>Q6_1 [If Q6=1] If yes, can you please indicate concrete cases and elaborate on the benefits / limitations of the TDM exceptions?</p>	<p>You will need to answer based on your institution's experience.</p> <p>Experience from some countries has demonstrated that the aggressive approach of publishers and other rightsholders has either had a chilling effect on what can be done, with either threats of legal action, or demands for payment.</p>
<p>Q7. [If Q2=yes and/or Q4=yes] Have you faced any barriers in making use of the TDM exceptions? (I have not faced any barriers, Legal uncertainty about my use case, Difficulties to obtain lawful access to the works, Technical restrictions and Technological Protection Measures (TPMs) preventing TDM on content to which I have lawful access, TDM not allowed under licence or contract, Difficulties to identify rights reservations expressed by rightholders, High volume of content for which rights were reserved ('opted out'), Other, please specify)</p> <p>Q7_1 [If Q7=4,5] Can you quantify the amount of content where the rightholder has implemented (technical) measures to prevent mining of content?</p>	<p>You will need to answer based on your institution's experience.</p> <p>Experience from elsewhere points to the following issues:</p> <ul style="list-style-type: none"> ● Publishers have sought to create confusion by claiming that the TDM exception does not allow AI uses, that licences need to be paid to use AI tools (such as Copilot), as well as seeking to impose unlimited liability for the actions of library users. ● Publishers refusing to licence works to libraries, or removing access to them without notice. ● A lack of meaningful and rapid means of removing or circumventing technological protection measures. ● Extensive 'opting out' of TDM by companies which prefer to sell licences directly to major private players.
<p>Q16. What unexpected benefits or challenges have you experienced in relation to the introduction of the TDM exceptions?</p>	<p>Issues here could include:</p> <ul style="list-style-type: none"> ● The willingness of rightholders to make claims that run directly counter to the law

	<ul style="list-style-type: none"> • The narrowness of the exception under Article 3
Education Questions (for Education Institutions)	
<p>Q17. Have you ever relied on the copyright exception for digital teaching to use copyright-protected content in your teaching activities? (Yes, No, I don't know)</p> <p>Q17_1 [If Q17=Yes] Can you give some examples of the impact that this exception has had on your work, for example on the use of specific digital materials in your (online) courses and/or in cross-border situations (e.g. easier use of digital materials in class, teaching students online, including those in other countries)?</p>	<p>You will need to answer based on your institution's experience.</p> <p>You will want to reflect, amongst other things, on:</p> <ul style="list-style-type: none"> • Whether you actually can use the exception, or are you obliged to buy licences instead • Whether the new rules have changed anything in reality compared to the current situation
<p>Q18. To what extent has the exception for teaching enabled the use of digital content in classrooms and in digital teaching (including cross-border) in practice? (To a great extent, To some extent, To a limited extent, Not at all, Do not know / no opinion)</p> <p>Q18_1 [If Q18=3,4] Can you elaborate on your response?</p>	<p>You will need to answer based on your institution's experience.</p> <p>You may want to consider that:</p> <ul style="list-style-type: none"> • Libraries are only covered if they are part of a formal education institution • The Directive allows significant possibilities to override the exception by allowing/imposing licensing
<p>Q19. Has the digital teaching exception impacted the costs related to the use of protected content in teaching activities in your Member State? (Yes, they have increased (please specify by how much), Yes, they have decreased (please specify by how much), They have remained stable)</p>	<p>You will need to answer based on your institution's experience.</p> <p>You could consider that the Directive includes a clarification that many materials can be left subject to</p>

	licensing, and so an obligation to pay, which would risk increasing costs.
<p>Q20. Are you required, under the national law of your Member State, to rely on available licences for educational uses rather than being able to use the exception? (Yes, No, I don't know)</p> <p>Q20_1 [If Q20=Yes] Are these educational licences easily available on the market? (To a great extent, To some extent, To a little extent, Not at all, I don't know)</p> <p>Q20_2 [If Q20=Yes] To what extent do these licences meet your needs? (To a great extent, To some extent, To a little extent, Not at all, I don't know)</p> <p>Q20_3 [If Q20_2=To a little extent; Not at all] Can you please elaborate on your response and detail any shortcomings?</p>	To answer Q20, you can look at the sources referred to in the introduction, if you do not know already. The other questions will require you to answer according to your experience.
Q23. What unexpected benefits or challenges have you experienced in relation to Article 5?	As above, you may want to consider a lack of consideration for the needs of informal/non-formal education institutions such as libraries, a failure to make clear that minimal uses should not be subject to remuneration or other points.
<p>Preservation (Heritage Institutions)</p> <p><i>For the next few questions please note that Article 6 of the Directive provides for a copyright exception for cultural heritage institutions to make copies of any works that are permanently in their collections in order to preserve them.</i></p>	

<p>Q24. To what extent does the preservation exception help your organisation meet its objectives? (To a great extent, To some extent, To a limited extent, Not at all, I don't know)</p> <p>Q24_1 [If Q24=3,4] Can you please elaborate on your response and highlight any shortcomings?</p>	<p>In your response, you will want to consider whether the law as it exists now is any different to what it was beforehand.</p> <p>A key weakness for us is the failure to cover licensed content, meaning that large quantities of contemporary library collections simply are not affected by the Directive.</p>
<p>Q25. Do you experience any of the following challenges when applying the preservation exception? (I do not experience any challenges, Uncertainty over the works / other subject matter covered by the exception, Uncertainty over the uses allowed under the exception, Other (please specify))</p>	<p>You will need to answer based on your institution's experience. You may also want to reflect on:</p> <ul style="list-style-type: none"> ● The limitation of the exception to materials permanently in the library's collection (i.e. not those that are simply accessible online, or temporarily licensed), which leaves out website archiving and social media preservation projects. ● The lack of clear permission to carry out other actions linked to preservation, such as use for indexing, the creation of bibliography, the taking of copies for insurance and more.
<p>Q26. Do you experience any of the following benefits when applying the preservation exception? (Greater legal certainty, Reduced need for licensing, Better preservation of works, None of the above, I don't know, Other (please specify))</p>	<p>You will need to answer based on your institution's experience, and whether this has changed since the law was changed. You may want to reflect on:</p> <ul style="list-style-type: none"> ● Any improvements in terms of the possibility to preserve works proactively, rather than needing to look for a commercial copy first ● Any improvements in terms of cross-border cooperation in preservation ● The limits of the scope of the Directive, which effectively excludes licensed content

<p><i>For the next few questions please note that Article 14 concerns works of visual art in the public domain. It provides that when a work is in the public domain, reproductions of the work are also not protected, unless the reproduction itself is original.</i></p>	
<p>Q27. To what extent has Article 14 provided you with legal certainty on the reproduction of public domain visual artworks? (To a great extent, To some extent, To a little extent, Not at all, I don't know)</p> <p>Q27_1 [If Q27=3,4] Can you please elaborate on your response?</p>	<p>You will need to answer based on your institution's experience. You may also want to reflect on:</p> <ul style="list-style-type: none"> • To what extent the rules also apply to the sort of works held in libraries • The legal uncertainty arising from the interplay with 'paid public domain' rules such as those in Italy • To what extent the limitations on 'works of visual arts', rather than all public domain materials, restrict your use of this article.
<p>Q28. To what extent has Article 14 enabled you to increase the reuse / dissemination of public domain visual artworks? (To a great extent, To some extent, To a little extent, Not at all, I don't know)</p> <p>Q28_1 [If Q28=3,4] Can you please elaborate on your response?</p>	<p>You will need to answer based on your institution's experience. You may also want to reflect on:</p> <ul style="list-style-type: none"> • To what extent the rules also apply to the sort of works held in libraries • The legal uncertainty arising from the interplay with 'paid public domain' rules such as those in Italy • The exception is limited to works of visual art, we prefer to have the exception extend to literary works as well.
<p>Section 2.2: Licensing mechanisms (ECL, OOCW, VoD) (Heritage Institutions)</p> <p><i>The section aims to assess the impact of the Directive on the functioning and use of collective licensing with extended effect, rules on out-of-commerce works, and the Video on Demand negotiation mechanism.</i></p>	

<p>Q29. Have you entered into a licence with a CMO for use of out-of-commerce works? (Yes, No, I don't know)</p> <p>Q29_1 [If Q29=No] Please explain your reasons for not entering an OOCW licence (e.g., the relevant CMO could not be identified, the CMO refused to negotiate, lack of funding, etc.).</p>	<p>You will need to answer based on your institution's experience. You may also want to reflect on:</p> <ul style="list-style-type: none"> • The failure to complete the process for implementing the DSM Directive's provisions on Out of Commerce Works (OOCW) in many countries • The lack of stakeholder dialogues between heritage institutions and CMOs in many countries, due to member states not taking the initiative • The cost/negotiating time involved in agreements, as well as decisions by CMOs simply not to licence, or to restrict licences (for example only to certain geographies) • The complexity of having to obtain licenses from multiple CMOs for a single dataset/collection
<p>Q30. Has your institution relied on the exception for the use of OOCWs under Art. 8(2) of the Directive (the fallback mechanism)? (Yes, No, I don't know)</p>	<p>You will need to answer based on your institution's experience.</p>
<p>Q31. [If Q29=Yes or if Q30=Yes] How many OOCWs have you made available online since the implementation of the Directive in your country? Where possible, please differentiate between the use of licensing and the fall-back exception. (If available, please share visitor / usage statistics for the OOCWs you have made available online). In my</p>	<p>You will need to answer based on your institution's experience.</p>
<p>Q32. [If Q29=Yes or if Q30=Yes] What types of works have you primarily digitised and made available under this</p>	<p>You will need to answer based on your institution's experience.</p>

<p>mechanism? (Books, Periodicals (e.g., journals, newspapers, and magazines), Ephemera (e.g., posters, leaflets, pamphlets, newsletters, brochures), Musical works, Sound recordings, Audiovisual works, Photographs, Video games, Other (please specify))</p>	
<p>Q33. [If Q29=Yes or if Q30=Yes] What are the main challenges that you have encountered in making use of the OOCWs mechanism? (Difficulty with CMO negotiations, Burdensome reasonable-efforts needed to determine whether works are out of commerce, Problems with cross-border application, Handling opt-outs from rightholders, None of the above, I don't know, Other (please specify))</p>	<p>You will need to answer based on your institution's experience. Experience from elsewhere indicates the following challenges:</p> <ul style="list-style-type: none"> ● A lack of implementation by governments ● Giving CMOs 'representative' status without them being truly representative ● An unwillingness of CMOs to negotiate in good faith ● The cost of negotiations and subsequent licences ● A refusal to offer licences for use outside of your own country <p>THERE IS A FLAW IN THIS QUESTION – IT SHOULD BE AVAILABLE TO ALL, NOT JUST TO THOSE VOTING 'YES'</p>
<p>Q34. [If Q29=Yes or if Q30=Yes] What are the main benefits that you have encountered in making use of the OOCWs mechanism? (Wider public access to works, Easier cross-border dissemination, Simplified negotiations, Reduced transaction costs for clearing individual works, None of the above, I don't know, Other (please specify))</p>	<p>You will need to answer based on your institution's experience. However, it appears that so far the rules have had little if any effect – most OOCW that are available were also available before under national schemes. As a result, we would assume that benefits have been limited outside of some positive exceptions.</p>
<p>Q35. [If Q29=Yes or if Q30=Yes] What costs associated with using this mechanism have you incurred? Please</p>	<p>You will need to answer based on your institution's experience. However, we know that in some countries at least, the negotiation process has taken a long time and</p>

<p>distinguish, if possible, between licence fees and administrative costs.</p>	<p>used up extensive resources, and that licence fees themselves have been high.</p>
<p>Q36. How have the rules of the Directive affected your activities of digitisation and dissemination of out-of-commerce works? (Very positively impacted, Somewhat positively impacted, No impact, Somewhat negatively impacted, Very negatively impacted)</p>	<p>You will need to answer based on your institution's experience. However, as with Q34, it appears that so far the rules have have little if any effect – most OOCW that are available were also available before under national schemes. As a result, we would assume that benefits have been limited outside of some positive exceptions.</p>
<p>Q38. To what extent has the mechanism led to increased legal uses of out-of-commerce works compared to the situation before transposition of the DSM Directive? (To a great extent, To some extent, To a little extent, Not at all, I don't know)</p>	<p>See the note to Q36.</p>
<p>Q40. In addition to information included on the EUIPO portal, how has your organisation ensured that rightholders are informed about the use of their works under a OOCWs licence or exception, including about the possibility to exclude their works from such use?</p>	<p>You will need to answer based on your institution's experience.</p>
<p>Q41. Approximately how many rightholders have informed you that they wish to exercise their right to exclude their works / other subject matter from the OOCWs mechanism since transposition of the Directive? Please provide details on whether exclusions have focused on entire catalogues or specific works.</p>	<p>You will need to answer based on your institution's experience. However, experience so far indicates that this number is very low.</p>
<p><i>For the next few questions please note that Article 8 concerns a mechanism for cultural heritage institutions (CHIs) to make available out-of-commerce works (works that are no longer commercially available through their usual sales channels) from their collections. Article 12 provides that, within well-defined areas of use, where individual authorisation</i></p>	

from rightholders is impractical, licensing agreements concluded by collective management organisations may be extended to apply to rightholders who have not authorised that collective management organisation to represent them. Rightholders have a right to exclude their works from both the out-of-commerce mechanism and licences with extended effect.

Q48. What unexpected benefits or challenges have you experienced in relation to the Article 8 (out-of-commerce mechanisms) and / or Article 12 (extended collective licensing) mechanisms?

You will need to answer based on your institution's experience. However, as above, weaknesses elsewhere include:

- Poor/slow implementation by governments
- A failure truly to check whether CMOs are representative before allowing them to offer extended collective licences (ECLs), and so cancel out the exception
- A failure to hold stakeholder dialogues between CMOs and heritage institutions
- A high cost for negotiating licences
- A refusal by CMOs to offer licences, or only to offer them on a limited basis, or at a high price

Q49. Do you consider that out-of-commerce works made available by CHIs under the conditions of the Directive should be used for AI training purposes? Please explain any measures that you have taken to limit or prevent such uses of out-of-commerce works (e.g. licensing conditions, technological protection measures).

You will need to answer based on your institution's experience. However, most efforts to build public interest AI depend extensively on the possibility to draw on library collections, in particular when it comes to 'smaller' languages or more specialised topics.

It will also be worth noting that rightholders are ALREADY able to 'opt out' from commercial text and data mining under Article 4 of the Directive, and so what is being asked here is directly focused on non-commercial/public interest AI development.

<p>Q50. Have you participated in any pre-implementation and / or subsequent sector-specific dialogues organised by Member States on the OOCW mechanism? (Yes, No, I don't know)</p> <p>Q50_1 [If Q50=Yes] To what extent did these dialogues improve the following: a) the relevance and usability of the mechanism b) effective safeguards for rightholders (To a great extent, To some extent, To a little extent, Not at all, I don't know)</p>	<p>You will need to answer based on your institution's experience.</p>
<p>Section 2.5: Other impacts (Research Organisations, CHIs, Educational Institutions)</p> <p><i>The following questions concern the value added by the Directive, as an EU-level intervention, compared to the pre-existing situation in the Member States. Please respond based on your direct experience.</i></p>	
<p>Q126. Based on your experience, please indicate one key benefit or value added by the DSM Directive, if any?</p>	<p>One topic that is neglected completely by the survey is the impact of provisions preventing contract terms or TPMs from blocking use of exceptions. This has provided an opportunity to introduce this concept into national laws, and in some case generalise it across all exceptions. However, implementation has been mixed.</p> <p>Elsewhere, it may well have been positive to provide at least some protection for TDM (even if this only applies in limited circumstances) and preservation (including cross-border), but the Directive's effect on issues that count for research and heritage institutions appears to be low overall compared to what came before so far.</p>
<p><i>The following questions concern the efficiency of the Directive and aim to assess the incurred costs of the Directive. Please respond based on your direct experience.</i></p>	

<p>Q127. To what extent has your organisation incurred compliance costs because of the Directive? (To a great extent, To some extent, To a little extent, Not at all, I don't know)</p>	<p>You will need to answer based on your institution's experience. Costs will likely come from:</p> <ul style="list-style-type: none"> • Requirements around the storage of data created in the process of TDM • Negotiation and licensing costs for education, as well as giving access to OOCW
<p>Q128. What is the nature and level of those compliance costs and in relation to which of the Directive's provisions are they incurred?</p>	<p>See the note on Q127</p>
<p><i>The following questions concern the coherence of the Directive and aim to assess to what extent the provisions of the Directive are coherent with other national or international laws.</i></p>	
<p>Q129. How well do the DSM Directive's provisions align with other relevant EU legislation (e.g., GDPR, AI Act, Digital Services Act, Orphan Works Directive)? (from not at all aligned (1) to fully aligned (5))</p> <p>[If Q129=1 or 2] Please specify any particular laws where you have noticed alignment or conflict.</p>	<p>You may want to highlight, in your response:</p> <ul style="list-style-type: none"> • Inconsistent approaches to what types of research are covered • The contradiction between support for knowledge valorisation and research partnerships in other EU laws and programming, but the discrimination against these in the DSM Directive's provisions on TDM • The lack of protection for research, education and cultural institutions against unfair contract terms for access to materials (Unfair Terms Directive, Data Act)
<p>Q130. Have you experienced any legal or practical tensions or conflicts between the DSM Directive as</p>	<p>You will need to answer based on your institution's experience.</p>

implemented and other national laws in your country?
(Yes, No, I don't know)

Q130_1 [If Q130=Yes] Please describe the tension or
conflict and its impact.