

# – FOR A BALANCED COPYRIGHT –

Memorandum in view of the 2014 Flemish, national and European elections

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**Flemish cultural, scientific and educational organisations and their users are concerned about the imbalance and gaps in the copyright legislation. They urgently appeal therefore to all stakeholders to keep information accessible and available for everybody. They strive for a ‘balanced copyright’ which much better guarantees the balance of interest between users and copyright holders.**

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2. Limits to extending copyright
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4. A thorough revision of all exceptions for the benefit of users: less restrictions and more flexibility for new ways of use of information.
5. No erosion of legal exceptions
6. Room for digitisation of our cultural heritage
7. Transparent management companies
8. Support for open access and data mining in research work
9. An honest policy framework for re-use of public sector information.

*This memorandum has been issued by the [Samenwerkingsverband Auteursrecht en Samenleving \(SA&S\)](#) (Partnership for Copyright and Society) and the [Gebruikersgroep cultureel erfgoed en auteursrecht](#) and has also been signed by several other stakeholders. It expresses the view of Flemish cultural, scientific and educational organisations such as archives, museums, libraries, universities and arts organisations. In this memorandum we refer to this group as ‘the organisations’.*

Current digitisation brings with it wholesale changes in our society and in the way people deal with information. New forms of publication develop in quick succession and the internet ensures a lot of information is available to everybody, everywhere all of the time. This development cannot fail to have important consequences for all services provided by cultural, scientific and educational organisations, such as archives, museums, libraries, universities and arts organisations.

## **Priority demands on every political level**

### *On a European level:*

- All members of the European parliament are called upon to work on reducing the copyright protection period. The EU must play an important role during the (re)negotiations of international agreements.
- All members of the European parliament are also called upon to pay more attention to the exceptions to copyright during the upcoming evaluation and/or review of the 2001 European Copyright Directive. New exceptions such as for e-lending and opening up of collections of certain organisations are highly necessary. These exceptions must be guaranteed workable and there is also a need for a 'fair use'-exception after the American model. Within its framework, open access and data mining can also be considered.
- The recently approved orphan works Directive is not workable for any organisation, definitely where mass digitisation is concerned. This Directive must be reviewed as soon as possible because its scope is too narrow and the obligatory prior diligent research process is practically speaking not feasible.

### *On a national level:*

- All members of the Belgian parliament are called upon to end the unfair situation where DRM can erode all exceptions to copyright. All copyright must include the fact that organisations are allowed to neutralise all technical protection measures when they would like to use an exception. Moreover, copyright must be adapted in such a way that it becomes impossible to annul e-content exceptions with licences.
- Signatories request that the members of Belgian parliament extend the existing exception for people who are visually impaired to people with print disability's.
- Signatories explicitly request that the members of Belgian parliament listen to them when the orphan works Directive is converted into Belgian law in parliament.
- Members of Belgian parliament must work even more on developing a transparent framework for collective management of copyright. Management companies must, amongst others, give more clear information about the works they manage and they must use more transparent prices.
- The national government is asked to quickly convert into Belgian law all provisions from the international 'WIPO-Treaty on limitations and exceptions for visually impaired persons and persons with print disabilities' (approved on 28 June, 2013).

### *On a regional level:*

- All members of the Flemish parliament are called upon to create a consultative platform between users and copyright owners.
- Members of the Flemish parliament must involve all organisations when reviewing the Flemish Decree regarding re-use of public sector information during the implementation of the [Directive 2013](#) amending the European '[Directive 2003 on the reuse of public sector information](#)'.

## **Redressing the balance between users and copyright owners.**

The [European Directive on the harmonisation of certain aspects of copyright and related rights in the information society](#) was [converted](#) in 2005 into the [Belgian Copyright law](#). It aimed to strike a balance between legitimate interests of copyright holders and interests of the general public because our information and knowledge society benefits from a decent and low threshold access to information. Organisations are however concerned about the copyright's expansion surge and its rigid implementation. They stress they are not against copyright as such, but have to conclude that copyright is leaning in favour of copyright holders, partly because it is not adapted to the digital world.

That is why these organisations welcome the initiative [published](#) in December 2012 by the European Commission to modernise European copyright, which is also the general drift of [Doorbraak 6 'Herkalibreren van de toepassing van het auteursrecht'](#) (Breakthrough 6: 'Re-calibration of the copyright implementation) as it was formulated at the Cultuurforum 2020 (Culture forum) in 2010. All organisations call upon all policy makers to actively participate and pay special attention to the interests of society, organisations and their users and those of the distribution of information in general.

Inspiration for a more balanced copyright can be found for example in the [Wittem Code of Draft / European Copyright Code](#) from 2010.

### **Limits to extending copyright**

International and European legislation has been strengthening copyright in Europe for the last 20 years. Copyright has for example been widely extended to include pictures, software, databases etc. and a regime of related rights has been introduced (performing artists, broadcasting organisations, music and film producers, database producers). Exclusive rights have also been widened, making copyright also applicable to both digital copies and making material digitally available. Finally, copyright's protection period was extended in 1994 from 50 years to 70 years after the author's death. In 2011 a similar protection period extension was created for music recordings of performing artists and music producers, after forceful lobbying by the music industry.

Such an extension and strengthening of copyright was not necessary however in order to still do justice to the original purpose of copyright which is stimulating creativity and improving knowledge development. Too much emphasis on the copyright holders creates exactly the opposite, namely an obstruction against creating new work which by its very nature uses performances from the past.

*Signatories consider further extension of exclusive rights unacceptable.*

### **A more transparent protection period**

The current 70 years' protection period causes many problems because it is often impossible to trace who the copyright holders are. The organisations' proposal therefore is to shorten this period and to bring it in line with patents, i.e. 20 years. As a matter of less importance it could also be organised to lengthen this period (maybe even up to the current period of 70 years after the author's death) on the condition that copyright holder has their work registered after this period of 20 years. Should this registration not take place then author indicates they do not require any further protection and anybody can freely use the work in question. If registration does take place, then author keeps their

copyright and at the same time the work's copyright status is transparent for everybody. Such a registration would then also at the same time immediately offer a solution for the problem of orphan works, because copyright holders would no longer remain unknown and untraceable. Such a change would require an adjustment of international agreements.

*Signatories call therefore upon all policy makers to make a start of this process for a more transparent protection period.*

### **A thorough revision of all exceptions for the benefit of users: less restrictions and more flexibility for new ways of use of information**

The European Directive regarding copyright in an information society contains a limiting list of exceptions to copyright which have partially been introduced in Belgian Copyright law. These exceptions serve general interest, freedom of expression or scientific and educational purposes. These exceptions are therefore of the utmost importance for the organisations' informative duties and collection management. Such a limiting list however does simultaneously restrict any possibility to respond in a flexible way to any new developments and to the users' quickly changing requirements right at the time when the internet continuously creates new possibilities to use, recycle and distribute digital information. This list of exceptions must therefore become more flexible and dynamic.

As a result organisations are unhappy that the European Commission's first initiative in 2013 to modernise copyright in a digital environment, the '[Licenses for Europe](#)' project, only deals with licences as a solution. Licences are the result of negotiations between copyright holders and users. Gaining access to copyrighted material however must not solely depend on the willingness of copyright holders to grant licences.

Organisations need copyright exceptions within the digital domain also. These exceptions would ensure that certain uses of copyrighted material are possible even without agreement from the copyright holders. Suffice it to refer to the [IFLA Treaty Proposal on copyright limitations and exceptions for libraries and archives](#).

Here are a few examples.

1. All public libraries, scientific and educational organisations, museums or archives not either directly or indirectly working with the purpose of economic or commercial profit are at the moment allowed to make digitally available copyrighted parts of their collections to individuals for research or private study purposes but only within the closed network of the organisation itself. In view of the fact that digital information is by nature independent of time and place, it is very strange that access to digital information is linked with a specific location. It must be possible for organisations to offer work from their collection online for non-commercial purposes from the moment these works are no longer commercially available or older than a certain number of years.
2. Libraries wishing to lend works digitally (e-lending) are faced with the copyright holders' point of view that the existing loan legislation is only applicable to physical copies. Regardless of the question whether such interpretation is correct, this is an illogical restriction of the libraries' core duties. All e-content present on the market must be available for e-lending if copyright holders receive a reasonable fee (e-lending fee).

3. Organisations (in particular museums) must have the option to offer their collection works online in an acceptable condition via their websites. When purchasing unique collection works, payment of any re-sale fee must be linked with a non-exclusive licence for re-use. Copyright should also offer more possibilities to organisations in terms of preservations and making digitally available any heritage collections for non-commercial use.
4. And finally, the existing exception for people with a visual disability must be extended to people with a reading disability (which includes people suffering from dyslexia). Organisations must be given the right to convert books for free into braille or a Daisy listening version and to subsequently distribute them both in analogue form and online to people with a reading disability. Suffice it to refer to the [European Memorandum of understanding regarding access to works for people with a reading disability](#), approved in 2010, and to the new WIPO-treaty of 28 June, 2013. We request from the national government to quickly incorporate into Belgian law the provisions included in the international '[WIPO-Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled persons](#)', in order to facilitate for all people with a reading disability access to publications in an appropriate format, both online and on a carrier, across all borders (cross-border lending) and within a legal framework respecting the copyright holders.

*Signatories ask for a review of the exceptions in copyright. It is first and foremost necessary to add new exceptions for the benefit of scientific and cultural organisations and the existing ones must be amended and become less dependent on sometimes unworkable restrictions and conditions.*

Finally we recommend the introduction of an [open norm in copyright](#), a so-called '*fair use*'-exception as an addition to the existing list of exceptions. It means that a work may be used on the condition that that use is fair (reasonable) with regard to the copyright holders. In order to classify use as 'fair', analysis must be made of following aspects by the judge: (i) purpose and nature of use, including the question whether use is commercial or educational and not-for-profit, (ii) nature of copyrighted material, (iii) size and scope of copied section in relation to the copyrighted work in its entirety and (iv) the effect any use may cause on the potential market or value of the copyrighted material.

*Signatories request the 'fair use'-exception in addition to the existing list of exceptions.*

### **No erosion of legal exceptions**

Technical protection measures such as a protection against copying can stop organisations from using all possibilities offered by copyright, such as making available materials with their internal network or making of copies for preservation purposes.

Organisations must be able to incorporate digital collections in their services and showcases for their public by organising data and applying instruments for data management. Organisations should therefore also receive the authorisation to nullify under certain circumstances any technical protection of electronic publications. Protection against copying must nowadays not be bypassed, not even when organisations are trying to apply legal exceptions. The 'solution' offered by copyright is not workable. Copyright holders must for example 'within a reasonable period of time' take 'sufficient voluntary measures' so that these exceptions can be applied. If the copyright holders do no such thing, users can ask a judge in summary proceedings to impose this provision. Such a regime puts of course a high threshold in place.

Copyright must therefore be amended in such a way that technical protection measures can be bypassed when organisations wish to apply a legal exception. Establishing a body supervising this bypassing of technical protection measures for the benefit of application of exceptions is an option which is entirely acceptable for organisations, if this can give copyright holders more security.

Technical measures are meant to prevent unauthorised use of copyrighted material by any user. When, however, this same technical measure is applied to materials in the public domain, not or no longer copyrighted, it makes its free use in actual fact impossible and that would be an unwanted restriction of the public domain.

Neither must exceptions be eroded contractually (with licences). Copyright law states explicitly that for all offline material, exceptions are mandatory and therefore not to be neutralised by contract. This obligation is not valid for online material, enabling all e-content copyright holders to eliminate all exceptions with licenses. This difference between offline and online materials must be removed. Exceptions are a user's right and must be applicable at all times.

*Signatories request guarantees so that they are able to use all legal exceptions to copyright without any obstructions. Moreover, all materials already in the public domain must remain there.*

### **Room for digitisation of our cultural heritage**

By digitisation their collections, organisations can make them more accessible for researchers and the general public. This is a core duty for the organisations. Copyright is often an obstruction however. All efforts to trace copyright holders and receive their consent are so substantial for larger digitisation projects, that these projects actually become unaffordable. Valuable cultural material which is no longer available on the market or of which the copyright holders cannot be traced (so-called orphan works) must not remain hidden in storage. We must be able to tackle the so-called 'digital black hole' of the twentieth century.

Organisations are worried that the in 2012 approved '[Orphan works Directive](#)' and the in 2011 approved '[Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works](#)' in reality shall remain idle words because the conditions included in them are practically unattainable. Before they can use orphan words, organisations must do a 'diligent search' for their copyright holders, which is impossible for mass digitisation projects. Moreover, their scope remains too restricted. Pictures for example are not affected by the guidelines and the guideline cannot be used by creative re-users.

*Signatories request therefore for the 'Orphan works guideline' to be adapted to the practical needs in terms of mass digitisation of our cultural heritage. A more easily feasible diligent search should be introduced on the condition that there is in place the necessary protection for the rights of the possibly later appearing (orphaned) author. Organisations must in any case be involved in the conversion of the 'Orphan works guideline' into Belgian law. Besides, for certain matters the Guideline imposes this provision on the member states.*

### **Transparent management companies**

When searching for copyright holders in the framework of digitisation projects, organisations often cooperate with management companies. In those case organisations do not receive enough clarity as

to which authors are members of a management company, what prices and licenses it works with and what rights and works it represents. The Belgian law regarding [control on collective management organisations](#) from 2009 was a step in the right direction but organisations are still faced with a lack of transparency of management companies. Organisations are therefore very happy with [the European collective management organisations directive proposal](#).

*Organisations request that this guideline obliges management companies to provide all necessary information regarding their services and to base their licence conditions on objective criteria. Organisations urgently request a transparent price structure with appropriate and proportional prices, specifically for cultural or educational use without commercial purposes. All administrative paperwork must be kept to an absolute minimum for organisations. Organisations plead for one office to be established with a referral authority to the correct management company for clearing all rights.*

Organisations propose the creation of a consultation platform. Both users and copyright holders need such a platform where they can solve in joint consultation painful issues such as prices, DRM, interpretation of exceptions, excesses, transparency in terms of content etc.

*Organisations demand that the government creates and facilitates a consultation platform between users and copyright holders.*

### **Support for open access and data mining in research work.**

Open access, in other words free access to online scientific information and the option to data mine are of the utmost importance for scientific organisations in terms of increasing their knowledge and of further scientific research. Especially publicly funded research must be made available in open access but this requires an exception to copyright law, which then should allow research organisations to distribute via proprietary channels scientific publications from affiliated researchers. Moreover, it must not be neutralised by contracts or licences with third parties. Such visibility shall improve the quality of research and stimulate any further cooperation, valorisation etc.

*Signatories request guarantees that publicly funded research shall always be made available in open access.*

Furthermore, it is important for research that data collections such as series of pictures, texts and videos which are still copyrighted are nevertheless accessible for scientists using data mining technology. Data mining is the targeted search for (statistical) connections in data collections in order to create profiles for scientific or commercial use. Automatically researching such collections and combining them can lead to new scientific understanding and to new publications.

*Signatories request that editors must be made to make their digital publications accessible to data mining.*

### **An honest policy framework for re-use of public sector information.**

On 27 June, 2013 was published in the Official Journal of the European Union the [review](#) of the existing European 'Directive on [Directive on the re-use of public sector information](#)'. Also included in this directive's scope are libraries, archives and museums which operate mainly with public funds. Aforementioned Directive provides a few necessary guarantees, for example: allowances are made for further development of the organisations' fledgling business models and for establishing public-private

cooperation in order to finance the cultural heritage digitisation. These allowances should be long-term.

Such legislation also contains a copyright aspect: organisations must make available for re-use to third parties, any material they are copyright holder of (all material of which copyright is held by a third party is excluded anyway).

When implementing this guideline in Flemish (specifically in [the decree regarding re-use of public sector information](#)) and national legislation, maximum attention must be paid to the organisations' specific duties and needs, their perilous public funding and the practical feasibility of all measures. In short, a fair policy framework must be established with a balanced re-use model benefiting content suppliers, content customers and (re-)users.

Organisations would like to furthermore express a few points of attention for an open Flemish data policy:

- If the government wants to open up or maintain open all databases it is funding, their funding must be guaranteed in the long run;
- An open data policy also contains a policy aimed at open and standard database systems;
- An open data policy must also make room for the public organisations' development of services, which should be chargeable to their customers. Diversifying prices and services should be part of their duties;
- Within the framework of an open data policy it must be possible to reach agreements and develop (technical) models which enable monitoring any (re-)use of data by third parties.

*Signatories request guarantees for a long-term implementation of allowances included in the re-use of public sector information guideline. Signatories also request to be involved in the incorporation of said guideline in Flemish and national legislation.*



## Initiators

This memorandum has been issued by the [Samenwerkingsverband Auteursrecht en Samenleving \(SA&S\)](#) (Partnership for Copyright and Society) and the [Gebruikersgroep cultureel erfgoed en auteursrecht](#).

### **Het Samenwerkingsverband Auteursrecht & Samenleving (Partnership for Copyright and Society)**

Several cultural, heritage, educational and scientific organisations have decided to join forces in terms of copyright. Together they shall strengthen the position of all organisations which defend users and public domain in terms of copyright. For that purpose they intend to jointly build their expertise. Ten participating organisations are:

- *Bibnet*
- *FARO. The Flemish interface centre for cultural heritage*
- *University of Ghent*
- *Luisterpuntbibliotheek (Flemish Library for Audio and Braille Books)*
- *Vlaamse Vereniging voor Bibliotheek, Archief & Documentatie (Flemish Organisation for Libraries, Archives and Documentation)*
- *Vrije Universiteit Brussel (Free University of Brussels)*
- *Overleg Kunstenorganisaties (Flemish Federation of Employers in the performing arts and music sector)*
- *University of Hasselt*
- *Lukas. Arts in Flanders*
- *Vlaams Instituut voor Archivering (Flemish Institute for Archiving)*

### **Gebruikersgroep cultureel erfgoed en auteursrecht (Users' group cultural heritage and copyright)**

The users' group cultural heritage and copyright was founded in 2010 in order to work around all problems surrounding copyright implementation. In the meantime the group has 45 members who strengthen their expertise and offer training courses which are open to non-members also. Apart from that it is also the group's purpose to influence policy developments in terms of copyright together with SA&S and other partners. FARO operates the group's permanent secretariat.

*Members of the users' group:* Abdijmuseum Ten duinen, AMSAB – Instituut voor Sociale Geschiedenis, AMVB – Archief en Museum voor het Vlaams leven te Brussel, Archiefbank Vlaanderen – Online databank van private archieven, Archiefcentrum voor Vrouwengeschiedenis (Amazone), BOZAR (Paleis voor Schone Kunsten), CEGESOMA – Studie- en documentatiecentrum oorlog en hedendaagse maatschappij, Centrum Agrarische Geschiedenis, Cinematek – Koninklijk Belgisch Filmarchief, Designmuseum, Erfgoedbibliotheek Hendrik Conscience, Erfgoedcel Leuven, Erfgoedcel Mechelen, ErfgoedPlus – Cultureel erfgoed in de provincies Limburg en Vlaams-Brabant, ETWIE – Expertisecentrum voor Technische Wetenschappelijk en Industrieel Erfgoed, Firmament – expertisecentrum voor het cultureel erfgoed van de podiumkunsten in Vlaanderen, Fotografiemuseum Antwerpen, Heemkunde Vlaanderen – Ankerpunt voor de cultureel-erfgoedgemeenschap heemkunde in Vlaanderen en het Brussels Hoofdstedelijk Gewest, Huis van Alijn, KADOC – Documentatie- en onderzoekscentrum voor religie cultuur en samenleving, Koninklijk Instituut voor het Kunstpatrimonium, Koninklijke musea voor kunst en geschiedenis, Koninklijke musea voor schone

kunsten van België, KUL- Universiteitsbibliotheekdiensten, Lukas – art in Flanders, M – Museum Leuven, M HKA – Museum van Hedendaagse Kunst Antwerpen, MIAT – Museum industriële technologie en textiel, Museum Dhondt-Dhaenens, Museum Dr. Guislain – Museum van de psychiatrie en geestezorg, Museum PlantijnMoretus, Museum Red Star Line, Mu.ZEE – Kunstmuseum aan Zee, Openbare Bibliotheek Brugge, PACKED – Expertisecentrum digitaal erfgoed, Provincie Oost-Vlaanderen / MovE – Musea Oost-Vlaanderen in Evolutie, Resonant – muzikaal erfgoed in Vlaanderen, Royal Museum for Central Africa, SMAK – Stedelijk Museum voor Actuele Kunst, STAM – Stadsmuseum Gent, Vlaamse Erfgoedbibliotheek, Vlaamse Kunstcollectie – Kunsthistorische musea Antwerpen, Brugge en Gent (KMSKA, Groeninge museum, Museum voor Schone Kunsten), Zilvermuseum Sterckshof.

## **Other signatories**

### ***Het Cultureel-Erfgoedoverleg***

*The Cultureel-Erfgoedoverleg (Cultural Heritage Consultation Platform) is an open consultation platform for organisations and institutions whose ambition it is to, independent from the Flemish interface centre for cultural heritage and the interface centre for local culture policy, play the role of umbrella organisation and a defender of interests within the cultural heritage sector with regard to several authorities but specifically to the Flemish government.*

*Following organisations are members of this platform: Archief en Museum voor het Vlaams Leven te Brussel (AMVB), Archiefbank Vlaanderen, Centrum Agrarische Geschiedenis (CAG), Centrum Vlaamse Architectuurarchieven (CVAa), Centrum voor Religieuze Kunst en Cultuur (CRKC), Erfgoedcel Mechelen en Erfgoedcel Waasland als vertegenwoordiger van de erfgoedcellen, ETWIE - Expertisecentrum voor Technisch, Wetenschappelijk en Industrieel Erfgoed, Familiekunde Vlaanderen, Het Firmament, Forum voor erfgoedverenigingen, Heemkunde Vlaanderen, Huis van Alijn, ICOM Vlaanderen, LECA | Landelijk Expertisecentrum voor Cultuur van Alledag, PACKED vzw - Expertisecentrum Digitaal Erfgoed, Resonant, Sportimonium, tapis plein, Vlaamse Erfgoedbibliotheek, Vlaamse Kunstcollectie (in naam van de drie partnernumera), Vlaamse Vereniging voor Bibliotheek, Archief & Documentatie (VVBAD).*

*Following groups and organisations are represented: the interprovinciaal depotoverleg (interprovincial consultation platform) and the museumconsulentenoverleg (museum consultants' consultation platform).*

*A representative of the Overleg Landelijke Archieven Vlaanderen (OLAV) is present during meetings.*

### ***FOV. Federatie Sociaal-Cultureel Werk***

*The FOV, or in full Federatie van Organisaties voor Volksontwikkelingswerk (Federation of Organisations for development work for the people), is an independent and autonomous VZW founded by authorised organisations in the field of social-cultural work for adults.*

*The FOV has been defending since 2000 the interests of subsidised social-cultural organisations with the authorities and other policy-making bodies. The FOV is therefore at the forefront of the fight to defend the social-cultural sector, for both its individual organisations and the sector as a whole.*

### ***Overleg Landelijke Archieven Vlaanderen (OLAV)***

*All nationally operating archives have come together in the Overleg Landelijke Archieven Vlaanderen (OLAV).(Flemish Consultation Platform for Nationwide Archives)*

*Signatories : Archief-, Documentatie- en Onderzoekscentrum voor het Vlaams-nationalisme (ADV N) (Archive, Documentation and Research Centre for Flemish Nationalism), Amsab – Instituut voor Sociale Geschiedenis (Amsab-Isg) (Institute for Social History), KADOC-KU Leuven – Documentatie- en Onderzoekscentrum voor Religie, Cultuur en Samenleving (Documentation and Research Centre for Religion, Culture and Society), Liberaal Archief (Liberal Archives), Rijksarchief in Vlaanderen (National Archives in Flanders).*

***Vereniging Vlaamse Cultuur- en Gemeenschapscentra (VVC)***

*(The Federation of Flemish Culture and Community Centres) De Vereniging Vlaamse Cultuur- en gemeenschapscentra vzw (VVC) is a federation whose members are the cultural and community centres in Flanders and Brussels. It is the spokesperson with regard to the Flemish and national government and several other organisations.*