



associação ensino livre

Por uma maior literacia tecnológica...

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*"...let us save what remains not by vaults and locks which fence them from the public eye and use in consigning them to the waste of time, but **by such a multiplication of copies, as shall place them beyond the reach of accident.**"*

-Thomas Jefferson, Feb. 18, 1791

Exmo. Sr. Presidente da Comissão de Assuntos Constitucionais, Direitos, Liberdades e Garantias

Assunto: A Associação Ensino Livre (AEL) vem, por este meio, solicitar que sejam tomados em consideração alguns pontos relativos à discussão e votação na especialidade, no próximo dia 26 de Junho, dos

- Projeto de Lei n.º 406/XII/2.^a (BE) - "Garante o exercício dos direitos dos utilizadores, consagrados no Código do Direito de Autor e dos Direitos Conexos";
- Projeto de Lei n.º 423/XII/2.^a (PCP) - "Assegura os direitos de utilizações livres previstas no Código dos Direitos de Autor e Direitos Conexos".

A Associação Ensino Livre (AEL) trabalha com instituições educativas do ensino superior e não superior no sentido de apoiar e promover a utilização de Software e Cultura livres, contando com professores e investigadores entre os seus associados.

Antes de mais, a Associação Ensino Livre gostaria de felicitar e agradecer o trabalho dos Srs.

Deputados pelo cuidado e esforço sobre estas matérias e a sua aprovação na generalidade.

Gostaríamos de sublinhar a importância da aprovação, na especialidade, dos três pontos em discussão, no sentido de se corrigir a lei de forma a que as medidas tecnológicas de proteção deixem de constituir ferramentas para contornar a lei, como se tem verificado nos últimos anos.

Neste sentido, **é importante que os utilizadores possam realizar as utilizações livres**, já consagradas no Código de Direito de Autor e Direitos Conexos.

Dada a importância da **preservação e disseminação do património científico e cultural**, é **crucial que a lei assegure, positivamente, que estas obras possam ser acessíveis e cuja**



fruição e reprodução não possam ser restringidas ou impedidas, por nenhum meio.

Assim, é necessário que a lei assegure que as **obras em domínio público se mantenham em domínio público**, tal como é recomendado pela Biblioteca Digital Europeia, Europeia.

Dois dos três princípios do “*The Public Domain Charter*”, publicado pela Europeia, são precisamente:

- **O que está em domínio público precisa de manter-se em domínio público.** O controlo exclusivo sobre obras em domínio público não pode ser restabelecido reclamando direitos exclusivos em reproduções técnicas de tais obras, ou usando medidas técnicas ou contratuais para limitar o acesso a reproduções técnicas de tais obras. Obras que estão em domínio público no formato analógico estão também em domínio público, uma vez digitalizadas.¹
- **O legítimo utilizador de uma cópia de uma obra em domínio público deve ser livre para (re) utilizar, copiar e modificar a obra.** O estado de domínio público de uma obra garante o direito de reutilização, de modificação e de reprodução e isto não pode ser limitado através de medidas técnicas ou contratuais. Quando uma obra entra em domínio público deixa de haver base legal para impor restrições no uso dessa obra.²

Como uma das diretrizes para a preservação da função do domínio público, o documento acrescenta que nenhum direito de propriedade intelectual pode ser usado para reclamar exclusividade sobre material em domínio público.

O mesmo entendimento tem a Communia Association³, criada a partir de uma rede temática, financiada pela Comissão Europeia, entre 2007 e 2011, e de cuja rede resultou o “*The Public Domain Manifesto*”⁴.

¹ Pág. 2 (PDF do documento em anexo). Tradução livre de “***What is in the Public Domain needs to remain in the Public Domain. Exclusive control over Public Domain works cannot be re-established by claiming exclusive rights in technical reproductions of the works, or by using technical and or contractual measures to limit access technical reproductions of such works. Works that are in the Public Domain in analogue form continue to be in the Public Domain once they have been digitised.***”

² Pág. 2 (PDF do documento em anexo). Tradução livre de “***The lawful user of a digital copy of a Public Domain work should be free to (re-) use, copy and modify the work. Public Domain status of a work guarantees the right to re-use, modify and make reproductions and this must not be limited through technical and or contractual measures. When a work has entered the Public Domain there is no longer a legal basis to impose restrictions on the use of that work.***”

³ Communia Association Website <http://www.communia-association.org/>

⁴ Acessível em <http://publicdomainmanifesto.org/manifesto>



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No caso das obras editadas por entidades públicas ou com financiamento público, nas quais se incluem **obras de carácter científico, é também necessário que a lei não permita a introdução de medidas tecnológicas de proteção.**

A **Comissão Europeia** tem, por diversas vezes, emitido comunicados sobre políticas de Open Access (Acesso Aberto) na investigação científica, como por exemplo no comunicado “*Scientific data: open access to research results will boost Europe's innovation capacity*”⁵. Fazemos notar ainda, que recentemente, a **Fundação para a Ciência e Tecnologia** lançou uma consulta pública⁶ sobre a proposta de política de acesso aberto de publicações científicas e que o **Conselho de Reitores das Universidades Portuguesas** subscreveu, em 2007, a Declaração de Berlim⁷, que define e estipula práticas de Acesso Aberto.

As medidas tecnológicas de proteção **não são compatíveis** com as políticas e práticas de acesso aberto e, portanto, a sua introdução em obras editadas por entidades públicas ou com financiamento público, não deve ser permitida. Caso contrário, todo o esforço que tem sido feito para a publicação em Acesso Aberto será destruído.

Acrescentamos, ainda, que **a lei deve incluir mecanismos dissuasores de práticas que tentem restringir**, quer o uso de obras em domínio público, quer o acesso legítimo a obras editadas por entidades públicas ou com financiamento público.

Terminamos apelando aos Srs. Deputados, que na discussão e votação desta matéria, no próximo dia 26 de Junho, possam chegar a um consenso de forma a proteger as utilizações livres, o domínio público e a investigação científica.

A Associação Ensino Livre acredita que estes três pontos são pacíficos, uma vez que apenas asseguram e clarificam princípios na lei, mas disponibiliza-se para clarificar qualquer questão, que possam entender.

Subscrevemo-nos com os mais cordiais cumprimentos,

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<http://ensinolivre.pt/>

⁵ Acessível em http://europa.eu/rapid/press-release_IP-12-790_en.htm

⁶ Acessível em http://www.fct.pt/dsi/docs/Proposta_FCT_OpenAccess_Artigos.pdf

⁷ Acessível em <http://oa.mpg.de/lang/en-uk/berlin-prozess/>



The Europeana Public Domain Charter

Europeana, Europe's digital library, museum and archive, belongs to the public and must represent the public interest.

The Public Domain is the material from which society derives knowledge and fashions new cultural works.

Having a healthy and thriving Public Domain is essential to the social and economic well-being of society.

Digitisation of Public Domain content does not create new rights over it: works that are in the Public Domain in analogue form continue to be in the Public Domain once they have been digitised.



Principles for a healthy Public Domain

Museums, libraries and archives of all kinds are holders of our cultural and scientific heritage. These memory organisations are the guardians of society's shared knowledge. They play an essential part in maintaining the Public Domain on behalf of citizens and must uphold a number of general principles. These principles are essential to preserve a meaningful understanding of the Public Domain and to ensure that it continues to function in the technological environment of the networked information society. These principles are not intended to prevent organisations from commercial exploitation of Public Domain works in their collections. Instead they provide a set of minimum standards that ensures that the Public Domain functions in the digital environment.

1. **Copyright protection is temporary.** Copyright gives creators a time-limited monopoly regarding the control of their works. Once this period has expired, these works automatically fall into the Public Domain. The mass of knowledge over recorded time is in the Public Domain; copyright offers an appropriate and time-limited exception to this status.
2. **What is in the Public Domain needs to remain in the Public Domain.** Exclusive control over Public Domain works cannot be re-established by claiming exclusive rights in technical reproductions of the works, or by using technical and or contractual measures to limit access to technical reproductions of such works. Works that are in the Public Domain in analogue form continue to be in the Public Domain once they have been digitised.
3. **The lawful user of a digital copy of a Public Domain work should be free to (re-) use, copy and modify the work.** Public Domain status of a work guarantees the right to re-use, modify and make reproductions and this must not be limited through technical and or contractual measures. When a work has entered the Public Domain there is no longer a legal basis to impose restrictions on the use of that work.

Guidelines for preserving the function of the Public Domain

There are a number of significant developments that threaten the function of the Public Domain. Over the last decades we have witnessed an expansion of the scope of copyright both in terms of time and protected subject matter. This has been detrimental to the Public Domain and the ability of citizens and memory organisations to interact with important parts of our shared culture and knowledge. The following Guidelines are issued to counter this trend.

1. **Any change to the scope of copyright protection needs to take into account the effects on the Public Domain.** Changes to the scope of copyright must not be retroactive. In the 20th century copyright has been extended to accommodate the interests of rights holders at the expense of the Public Domain. As a result a large portion of our shared culture and knowledge is locked away behind copyright and technical restrictions, and we must ensure that this situation will not be worsened in the future.
2. **No other intellectual property right must be used to reconstitute exclusivity over Public Domain material.** The Public Domain is an integral element of the internal balance of the copyright system. This internal balance must not be manipulated by attempts to reconstitute or obtain exclusive control via regulations that are external to copyright. No technological protection measures backed-up by statute should limit the practical value of works in the Public Domain. Industrial property rights, such as trademarks, should not be used to restrict the re-use and copying of Public Domain works.

Background

The Public Domain is a shared resource that underpins contemporary society. As knowledge and information are digitised, legal contracts are often being used that inhibit free access to the digitised Public Domain. This runs counter to the founding objective of Europeana. Our essential aim is to make Europe's Public Domain cultural and scientific heritage freely accessible to citizens in digital form to encourage the development of knowledge and stimulate creative enterprise and innovation. This is the position of the European Commission, who fund Europeana, and the Europeana Foundation, who run the service.

The Europeana Foundation is made up of international associations that represent museums, archives, audiovisual collections and libraries: the memory organisations which provide content to Europeana. It is in the Foundation's interest to be clear on the use and meaning of the Public Domain. Europeana belongs to the public and must represent the public interest.

This Charter is a policy statement, not a contract. It does not bind Europeana's content providers to any position. The Europeana Foundation is issuing the Charter in order to influence the debate among the Europe's memory organisations, policy makers and funders about the terms under which Public Domain digital content is made available.

In its access and re-use terms Europeana follows the policies of its content providers. Each of them is legally responsible for deciding the terms on which they make content available, and for determining and clearing any rights in their content. Consequently, there are a wide range of practices among institutions providing Public Domain content to Europeana.

The Public Domain Charter will help to promote greater consistency for the benefit of our users. Users have complained of the range of different practices and especially that some content providers charge for downloading and even for accessing digitised items which are in the Public Domain in their analogue form. They perceive this as a barrier to citizens wishing legitimate access to their Public Domain heritage.

What is the Public Domain?

The Public Domain comprises all the knowledge and information – including books, pictures and audiovisual works – which does not have copyright protection and can be used without restriction, subject in some European countries to the author's perpetual moral rights. The Public Domain provides a historically developed balance to the rights of creators protected by copyright and it is essential to the cultural memory and knowledge base of our societies. The Public Domain covers two categories of material:

1. **Works on which copyright protection has expired.** Copyright in a work in most of Europe lasts for 70 years after the death of its longest living creator. If copyright is held by a corporation, then it lasts for 70 years after publication. Once this temporary protection has come to its end, all legal restrictions cease to exist. It means that almost everything published, painted, photographed or released anywhere in the world before the 20th century is out of copyright and in the Public Domain.
2. **The essential commons of information that is not covered by copyright.** Works are not protected by copyright if they are not original. Ideas and facts are not covered by copyright, but the expression of them is. Laws and judicial and administrative decisions are excluded from this protection. This essential commons is regarded as too important for the functioning our societies to be burdened with legal restrictions of any nature even for a limited period.

It is important to note that next to the Public Domain as described above there are a number of other limitations and exceptions that reduce legal restrictions and ensure sufficient access to our shared knowledge and culture. These exceptions ensure that the copyright granted to creators does not interfere with certain specific requirements of society. They ensure access, enable the functioning of essential social institutions and provide for the social participation of individuals with special needs.

Why is the Public Domain important?

The Public Domain is the raw material from which we make new knowledge and create new cultural works. Having a healthy and thriving Public Domain is essential to the social and economic well-being of our societies.

Much of the world's knowledge – Diderot's *Encyclopédie*, the paintings of Leonardo, Newton's Laws of Motion – is in the Public Domain. Society constantly re-uses, reinterprets and reproduces material in the Public Domain and by doing so develops new ideas and creates new work. New theories, inventions, cultural works and the like are indebted to the knowledge and creativity of previous centuries.

The Public Domain in the digital age

The internet gives access to the digitised portion of that knowledge and creativity on a scale previously impossible. It is the driver for massive digitisation efforts that will fundamentally change the role of cultural and scientific heritage institutions. The digitisation of analogue collections creates new opportunities for sharing and creative re-use, empowering people to explore and respond to our shared heritage in new ways that our legislation has yet to catch up with. It has also brought copyright to the centre of attention for holders of our cultural and scientific heritage. Our memory organisations have for generations had the public duty of holding the heritage in trust for the citizenry and of making it accessible to all. Both of these functions are usually conducted at the citizens' – i.e. the tax payers' – expense.

Entrusted with the preservation of our shared knowledge and culture, not-for-profit memory organisations should take upon themselves a special role in the effective labelling and preserving of Public Domain works. As part of this role they need to ensure that works in the Public Domain are accessible to all of society, by making them available as widely as possible. It is important for memory organisations to recognise that as the guardians of our shared culture and knowledge they play a central role in enabling the creativity of citizens and providing the raw materials for contemporary culture, science, innovation and economic growth.

At the same time the transformation from guardians of analogue collections to providers of digital services places enormous challenges on these organisations. Creating and maintaining digital collections is expensive; the cultural heritage sector may lack resources for this new responsibility. Government sponsors may encourage or require organisations to generate income by way of licensing content to a wide variety of commercial users.

Public-Private Partnerships have become one option for funding large scale digitisation efforts. Commercial content aggregators pay for the digitisation in exchange for privileged access to the digitised collections. These activities are seen as a reason for attempting to exercise as much control as possible over digital reproductions of Public Domain works. Organisations are claiming exclusive rights in digitised versions of Public Domain works and are entering into exclusive relationships with commercial partners that hinder free access.

When this exclusivity locks down digital content and inhibits access and re-use by teachers, innovators and citizens, memory organisations may be compromising their core mission and undermining their relationship with their users. Works that are in the Public Domain in analogue form must remain freely available in digital form and digitisation of such works must lead to increased access by the public instead of new restrictions. To remain relevant in the digital age, cultural and scientific heritage organisations must strive to increase access to our shared knowledge and culture by being the primary points of access to the works that they have in their collections. Value-added services can be developed around content without the need to claim exclusive rights over works that have been in the Public Domain in analogue form.

Ultimately, at a political and policy-making level, it is in the interests of society that Public Domain knowledge and information be digitised. Once digitised, it should be freely available to creative enterprise, R&D innovators and technical entrepreneurs to use as the basis for generating ideas and applications yet to be envisaged.

The aim of this Charter is to give a clear signal to content providers, policy makers and the public that Europeana and the Europeana Foundation believe in and wish to strengthen the concept of the Public Domain in the digitised world. In order to do so we need a robust and up-to-date understanding of the nature of this essential resource.

If you would like to respond to the Europeana Public Domain Charter, please contact info@europeana.eu