

# Consultation on the National Cultural Heritage Digitization Plan 2022-2023

Statement by Creative Commons and Creative Commons Italy

4 July 2022

This statement is presented in the context of the Consultation on the National Cultural Heritage Digitization Plan (2022-2023) (hereinafter “the Plan”). It summarizes [Creative Commons](#)’ (CC) and Creative Commons Italy’s provisional position and key points on the Plan prepared by the Central Institute for the Digitisation of Cultural Heritage (Digital Library) of the Italian Ministry of Culture. CC and CC Italy (hereinafter collectively referred to as “CC”) welcome the opportunity to share this statement in the framework of this important consultation. This statement partly draws from other CC resources.

## Introduction

Creative Commons is a nonprofit organization that helps overcome legal obstacles to the sharing of knowledge and creativity to address the world’s pressing challenges. CC’s mission is to empower individuals and communities around the world by equipping them with technical, education, legal and policy solutions to enable better sharing of knowledge and culture in the public interest. To fulfill its mission, CC offers six free and easy-to-use copyright licenses and two public domain tools that simplify and standardize the way creative works are shared.

As part of its [Open Culture Program](#), CC works to ensure that the interests, concerns and needs of the public and cultural heritage institutions (CHIs) in fulfilling their public-interest mission are balanced with those of rights holders in a fair manner. CC also helps CHIs make the most out of CC licenses and tools to communicate what users can do with digitized material globally and across borders.

The Italian Chapter of Creative Commons has been working for years in the field of copyright in relation to Open Access policies with a network of national and international associations that aim to enhance the balance between copyright holders’ rights and the rights of users and society in general.

## Comment on procedure

From a procedural and methodological point of view, we welcome the decision by the Ministry of Culture to open public consultation on the draft Plan, allowing all interested parties to express their views on its contents. In this regard, we hope that the Ministry will also guarantee the participation of sectoral associations in any subsequent phases of the Plan and that, more generally, it will also adopt this methodology in the future on issues that have a significant impact on the cultural heritage sector.

## Substantive comments

From a substantive point of view, the strategic approach of the Plan, which explicitly espouses the principles of Open Access and FAIR data and carries out an extensive survey of the current status of digital reproductions, identifying a meticulous segmentation of the different sources of acquisition of digital reproductions and the types of reuse thereof, is welcome as an important step towards CHIs' digital transformation. The digitization of cultural heritage is crucial for the cultural growth of the country, and the resources of the COVID pandemic-triggered [National Recovery and Resilience Plan](#) (PNRR) present an opportunity not to be missed in view of a real digital transformation of the cultural heritage sector, as well as the implications it may have in the reuse of cultural heritage in the educational sphere.

However, it is our view that the National Cultural Heritage Digitization Plan will result in restricting, rather than increasing, access to and use of cultural heritage. The Plan's narrow determination constrains people's fundamental right to access culture and their freedom of artistic expression in a prohibitive way. We believe that, as drafted, the Plan would have a serious detrimental effect on creators' participation in generative creativity and on society as a whole. Further, the Plan does not take into consideration the global nature of access to heritage as a public good. Specifically, our main points are as follows:

1. The public domain must be protected because it enables essential access to knowledge and culture and fosters creativity.
2. The public domain is being unduly encroached upon by an application of cultural heritage law that unduly limits reuse and creativity opportunities against the public interest.
3. CC tools are the established standard used by CHIs and are important legal and communication tools between CHIs and their users.
4. CC licenses and tools have many benefits over tailored licenses or other bespoke standards.
5. The risks of undermining creativity and access to culture are not outweighed by the few revenue opportunities of paid licensing established through application of cultural heritage law.

In the following sections we provide more details on each of these points.

**1. The public domain must be protected as it enables essential access to knowledge and culture and fosters creativity.**

Public domain materials often constitute a significant part of CHIs' collections. Many CHIs work hard to digitize and make public domain heritage available to the public, in an effort to both preserve and openly share such heritage. This is a core aspect of their duty and public interest mission. Open sharing of public domain heritage can unlock limitless creativity and allow generative uses leading to knowledge progress. Public domain heritage can be used for any purpose, free of charge, without further copyright permission.

To preserve the integrity of the public domain, digital reproductions of public domain works must remain in the public domain.<sup>1</sup> No additional rights should attach to public domain material upon being digitized. Article 14 of the 2019 EU Directive on Copyright in the Digital Single Market enshrines this fundamental principle: what is in the public domain stays in the public domain. Any rule to the contrary would contravene the European principles enshrined in this Directive.

**2. The public domain is being unduly encroached upon by an application of cultural heritage law that limits reuse and creativity opportunities.**

The interrelationship between copyright and cultural heritage laws (whose broad definitions often include an array of copyright material) must be addressed to ensure everyone can enjoy their universal, fundamental right of access to culture everywhere in the world. Unfortunately, we believe the proposed Plan, through a maximalist interpretation of the Cultural Heritage Code that imposes a restriction on commercial use of public domain heritage, places the public domain under severe stress, in a way that goes against the spirit of EU law.

The proposed stand-alone MIC Standard for CHIs to use on public domain heritage collections regrettably limits reuse to non-commercial uses only, based on the Italian Cultural Heritage Code (not copyright). This is fundamentally at odds with Open Access principles and practice. This raises important concerns around rights overlap over the shared heritage of humankind, which belongs to the public. Using a copyright-like standard to restrict use to non-commercial purposes based on a right external to copyright law is an undue limitation on the free and unrestricted uses of public domain materials. It creates further enclosures of the public domain and hampers reuse possibilities to the detriment of the public.

What is more, this MIC Standard risks locking down collections behind financial barriers and creating confusion among users and reusers around the world. This will have negative impacts

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<sup>1</sup> Creative Commons, "Reproductions of Public Domain Works Should Remain in the Public Domain," 2019, <https://creativecommons.org/2019/11/20/reproductions-of-public-domain-works/>. See also the Public Domain Manifesto, <https://publicdomainmanifesto.org/>.

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on creativity, innovation and the provision of public goods and will severely curtail people's rights to access and reuse cultural heritage across borders. It will in turn result in a significant societal loss given the role of the public domain as the reserve of cultural heritage: a creative trove on which contemporary creativity depends.

Regarding the possibility of commercial reuse of images of cultural heritage in the public domain, the Plan does not take into account the many different types of commercial use and their different impacts on the activities of cultural institutions and on Italian society as a whole. In this sense, we would like the Ministry to clarify that so-called non-rivalrous commercial uses are not subject to authorisation and payment of the fee. It is indeed necessary to distinguish the reuse resulting from Open Access projects from other forms of rival commercial uses such as, for instance, the direct sale of images reproducing the cultural heritage. For example, images of public domain cultural heritage released under Creative Commons tools compatible with Open Access, such as the CC BY-SA (Attribution/Share-Alike) license, do not create any kind of exclusivity: the content remains available to the community for use and reuse with very few restrictions. Another example concerns faithful reproductions of public domain cultural heritage labeled with the Public Domain Mark (PDM) or released with CC0, two tools suitable for sharing in the public domain according to Open Access principles. To be clear, uses enabled through such licenses or tools do not conflict with economic exploitation of images by institutions themselves, do not negatively impact the market for commercial exploitation of cultural heritage and, on the contrary, positively impact Italian society by encouraging entrepreneurial creators to reinvent their own heritage.

The Plan should also be an opportunity to reaffirm what is already practiced and provided for by the Cultural Heritage Code and secondary legislation. Articles 107-108 of the Code, in their current version, do not contradict the adoption of open licenses, which can be assimilated to authorisation measures with a zero fee for any subsequent commercial reuse. Firstly, the zeroing of the fee is already present in numerous regulations for the reproduction of ministerial institutes as a discretionary faculty of the entity that has custody over the cultural heritage (Art. 108). Secondly, the lifting of the fee (essentially gratis use) for the publication of reproductions in all publishing products envisaged in these guidelines already in itself demonstrates the compatibility of the current regulations with the hypothesis of a zeroing of the fee for commercial uses, since publishing products distributed in commercial channels are considered as commercial products insofar as they generate revenue for the publisher. Consequently, it is requested that Open Access licenses be introduced in the guidelines in line with the principles affirmed in themselves, which devote ample paragraphs to the subject without providing operational tools that correctly embody the principles. In other words, the only operational solutions proposed (Standard MIC label) betray and completely misrepresent the purpose of Open Access practice.

- 3. CC tools are the established standard used by CHIs and are important legal as well as communication tools between CHIs and their users.**

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CC has been a dedicated steward of our [licenses and tools](#) for over 20 years. These are free, easy-to-use, and standardized tools that enable the worldwide sharing of creative content. CC licenses and tools are the easiest and simplest means to communicate to the public what uses can be made with the content and to facilitate wide dissemination of culture. They have become the standard for CHIs that are “opening up” their collections on the internet, helping navigate some of the challenges posed by copyright law and enabling broad reuse (see [open GLAM survey](#)).

As part of our stewardship role, CC seeks to develop and steward a legal, social, and technical infrastructure that supports open sharing that is impactful, generative, equitable, sustainable and resilient. We aim to care for and bolster innovative, user-centered solutions that meet concrete needs so as to encourage *better* sharing, especially in the cultural heritage sector.

CC tools can be used to place digital images and associated metadata into the public domain or indicate their public domain status. To that effect, CC provides two tools: the [Public Domain Mark](#) (PDM) and [CC0 \(1.0 Universal\) Public Domain Dedication](#) (CC0) — for a comparison of the two tools, see [CC0 PDM comparison chart - Creative Commons](#). Both serve to indicate that there is no underlying copyright in the digital image.

Hence, we are concerned by an explicit negative reference to Creative Commons and one of our tools (CC0) in the Plan. At the very least, these negative references and any explicit delegitimization of using CC0 over CHIs’ digitized cultural heritage collections to promote access, use and reuse of content in the public domain should be removed from the Plan. Instead, there should be an acknowledgement of their positive aspects and of how CC licenses and tools, including CC0, may be globally used for *better* sharing of cultural heritage in the public interest.

Concerning data and datasets, we do not recommend releasing them under a CC BY license as suggested by the Plan. Instead, we recommend using the CC0 tool to release data and datasets throughout the international community. It is hoped that the Plan’s provisions will be amended in this sense, or else we believe the Italian cultural sector will experience negative consequences and suffer from lost opportunities for creative regeneration.

#### **4. CC licenses/tools have many benefits over tailored licenses.**

We do not support the Ministry of Culture’s decision to use this new MIC Standard tool to release faithful reproductions of public cultural heritage in the public domain. First of all, such a one-way approach would make it impossible to share images of cultural heritage on cultural promotion platforms such as Wikipedia, which entails free reuse of digital resources published thereon; lastly, this would place Italy in a position of total closure concerning Open Access policies. The refusal to adopt CC tools or open licenses, which are absent from the Plan, represents a missed opportunity to experiment with practices already underway in some of the world’s foremost institutions and puts Italy at a disadvantage in cross-border collaborations and

engagement with other open standards, due to lack of compatibility.

CC favors the adoption of a recognized global standard on cultural heritage resources shared by CHIs. CC licenses and tools are the most widely used [standard](#). One of the fundamental design principles of the CC licenses is granting clear, standard legal permissions to the public in advance. CC licenses achieve this result through [terms and conditions](#) that are “standard,” meaning the same terms and conditions apply for all content licensed under a particular CC license in every country. This reduces transaction costs for creators who want to enable certain reuses without negotiating and granting lots of individual permissions, and for reusers who want to make use of licensed content with minimal hassle. Custom open licenses or standards that are “[essentially CC-like](#)”, such as the proposed MIC Standard: (1) do not have the CC brand which risks causing confusion in both understanding and implementation, and (2) likely do not allow content to be remixed with the billions of existing (and future) CC-released works. Both of these factors will cause reduced use by the public in Italy and abroad, with detrimental effects on cultural vivacity.

Finally, the proposal for a digital identity certificate for images of public domain cultural heritage risks undermining the actual implementation of Open Access principles. The document is unclear about the purpose and modalities of this certificate. Concerningly, this certificate would go against the principles of free and unrestricted use of public domain materials.

#### **5. The risks of undermining creativity and access to culture are not outweighed by the few revenue opportunities of paid licensing.**

We at CC fully realize that CHIs often endure significant financial challenges to remain in activity. Many resort to licensing the rights in the works in their collections (when they are the copyright owners). Generating a licensing revenue stream is sometimes perceived as a way to achieve financial sustainability. However, according to experts and many studies,<sup>2</sup> licensing models are not cost effective and end up draining resources; overall increase in brand recognition and new, alternative income-generating activities (including commercial partnerships) enabled through open licensing generally [outweigh](#) any loss in licensing income.

Fundamentally, CHIs should not be required by law to request a fee for commercial uses of public domain heritage they manage, as this contradicts the value and function of humanity’s most important reserve of creative expressions: the public domain.

We nevertheless welcome the provision granting the possibility for CHIs to publish images of cultural heritage in the public domain free of charge in the publishing sector, by removing the

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<sup>2</sup> See, e.g. Tanner 2004: [http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum\\_SimonTanner.pdf](http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum_SimonTanner.pdf); Kelly 2013: <https://www.clir.org/pubs/reports/pub157/>; Pekel 2015: <http://pro.europeana.eu/blogpost/making-a-big-impact-on-a-small-budget-how-the-lsh-museums-share>; and Fonteoni 2017: <https://doi.org/10.14236/ewic/EVA2018.11>.

limit of EUR 70 cover price and of 2000 copies (paragraph U2 of the “Guidelines for the acquisition, circulation and reuse of reproductions of cultural heritage in the digital environment”). On the other hand, the possibility for institutions to derogate from this provision risks undermining any real liberalization in this sector. Therefore, we request that the possibility to derogate from this general provision be excluded from the Plan. The reference to “indirect profit” takes into account the fact that, with the amendment to the Cultural Heritage Code by Law no. 124/2017, such “indirect profit” for the free dissemination of images has already been eliminated, effectively extending the reuse scope of images beyond personal or study purposes. However, this assumption is only reflected in the regulation of the exceptions proposed for publishing activities and not in any other commercial use cases; we would like this exception to apply in all creative sectors.

## Conclusion

CC wishes to reiterate our gratitude for the opportunity to contribute to this important consultation. At CC, we truly believe in the power of open access for protecting and promoting cultural heritage. This type of *better sharing* helps build and sustain vibrant and thriving societies. CHIs have been the gate-openers to the world’s cultural heritage for centuries. By making their collections as openly accessible, shareable, and reusable as possible to the public — both on-site and online — they empower people, generation after generation, in offering them the scientific, historical, and socio-cultural resources to build a brighter future for themselves and their communities.

We would very much welcome an opportunity to meet with officials responsible for the development of this Plan to discuss, and remain at your disposal for any further information.

**Creative Commons**  
**Creative Commons Italian Chapter**  
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