



Cultural Heritage and the Public Domain

Bas Savenije

National Library of the Netherlands

Bas.Savenije@KB.nl

Annemarie Beunen

National Library of the Netherlands

annemarie.beunen@kb.nl

Abstract

The recent report of the “Comité des Sages” recommends that “cultural institutions should make public domain material digitised with public funding as widely available as possible for access and re-use”. One of the objectives of the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities is “encouraging the holders of cultural heritage to support open access by providing their resources on the Internet.”

Libraries often are the only source for public domain material such as unique manuscripts. This position puts them in power when determining the conditions under which reproductions can be delivered. This position is prone to change as soon as public domain material is available via internet and thus can be copied by anyone.

We can observe a variety in re-use policies among cultural heritage institutions, in which not only libraries but also archives and museums are involved. And there certainly is no unanimity when it comes to commercial re-use. The situation becomes even more complicated when public-private partnerships are involved in which the commercial party poses restrictions on access and/or re-use.

The paper analyses the legal issues that are at stake in deciding about the library's re-use policy of digitised heritage material within the public domain. It also gives an overview of arguments pro and con open access without any restrictions. Its conclusion is in favour of no limitations for re-use, commercial or not.

Finally, it analyses public-private partnerships in the light of these conclusions.

Key words: cultural heritage, open access, digitisation.

Introduction

For centuries, libraries, archives and museums from across Europe have been the custodians of our rich and diverse cultural heritage. They have preserved and provided access to the testimonies of knowledge, beauty and imagination, such as sculptures, paintings, music and literature. The new information technologies have created unbelievable opportunities to make this common heritage more accessible for all.

Recently, the European Commission commissioned a 'Comité des Sages' to make recommendations on ways and means to make Europe's cultural heritage and creativity available on the Internet and to preserve it for future generations. In the United States the Association of Research Libraries (ARL) endorsed a number of principle recommendations to its members regarding the digitisation of cultural heritage. Both the Comité des Sages and the ARL emphasize the added value of digitisation. The Comité underlines that the digitised material can in itself be a driver of innovation and can be at the basis of new services in sectors such as tourism and learning (Comité des Sages, 2011) and the ARL stresses the added value for researchers (ARL Principles July, 2010). For over a century, libraries have participated in successful resource sharing cooperatives that have made content widely accessible. According to both the ARL and the Comité, the same spirit should govern commercial digitisation activities. In the best of all possible worlds, there would in our view be some level of free access to all content, with only special value-added services restricted to a subscription model.

A landmark in the discussion about Open Access to information is the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities. Referring to this Declaration, people often put emphasis on recent research

publications. But the following is also one of the objectives of the Declaration: “encouraging the holders of cultural heritage to support open access by providing their resources on the Internet” (Berlin Declaration, 2003). Therefore, in the spirit of the Berlin Declaration, the ARL encourages its members’ libraries to grant all non-commercial users “a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship”. And: “If fees are to be assessed for the use of digitised public domain works, those fees should only apply to commercial uses” (ARL Principles July, 2010).

In our view, cultural heritage institutions should make public domain material digitised with public funding as widely available as possible for access and reuse. The public sector has the primary responsibility to fund digitisation. The involvement of private partners, however, is encouraged by ARL as well as the Comité des Sages. Private funding for digitisation is a complement to the necessary public investment, especially in times of economic crisis, but should not be seen as a substitute for public funding. As we can see from these reports there are a number of arguments in favour of digitisation and also of providing maximum accessibility to the digitised cultural heritage.

In this paper we will investigate the legal aspects of digitisation of cultural heritage, especially public domain material. On the basis of these we will make an inventory of policy considerations regarding reuse. Furthermore, we will describe the conclusions the National Library of the Netherlands (hereafter: KB) has formulated and the arguments that support these. In this context we will review public-private partnerships and also the policy of the KB. We will conclude with recommendations for cultural heritage institutions concerning a reuse policy for digitised public domain material.

Legal Aspects

Works in the Public Domain

An important legal principle is that intellectual property rights are monopolies of restricted duration (although some, like trademarks, can be renewed). At some point in time protection expires and that is a great asset because eternal protection would disproportionately hamper the users’ freedom of action.

Within the whole European Union, copyright (leaving the neighbouring or related rights aside) expires 70 years after the death of the author. Where copyright in a work has expired or its maker has waived his or her copyright, the work is said to have fallen in the Public Domain.

The question whether the scanning of Public Domain material creates new copyright in the resulting scans is an interesting one. There is no clarity regarding this issue, however, either in the law or in jurisprudence. Two contrary views exist.

1. Digitisation does not create new copyright because it does not add any originality to the scanned work. It can be compared with making a photocopy of a book: the copier does not create copyright in the copies made. Scans too are merely faithful reproductions of the original. The same has been argued for photographs of two-dimensional paintings, prints or manuscript illustrations (Deazley, 2001; Beunen and Aalberts, 2002; Beunen, 2008; Chavannes, 2008, contra: Garnett, 2000; Stokes, 2001). Europeana's Public Domain Charter also states that scanned Public Domain works remain free of copyright; "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" (Europeana Public Domain Charter, 2010). The Comité des Sages is also of the view that simple digitisation should not give rise to new rights. Moreover, the European Commission has adopted this view in its 2011 Recommendation on the digitisation and online accessibility of cultural material and digital preservation. Here, the European Commission recommends that Member States ensure that material in the public domain remains in the public domain after digitisation.
2. Digitisation does create new copyright because creativity is added to the Public Domain work in the form of OCR modification, addition of metadata by experts etc. However, it goes without saying that the bare source text without additions remains free of copyright (e.g. an annotated play by Shakespeare: his text without annotations remains in the Public Domain).

If a court were to rule in favour of the second view then the organisation that made the scans would still have the choice whether or not to claim copyright in its scans. A point of attention in this regard is the situation in which scanning is outsourced: Scanning companies sometimes claim copyright in their scans and it is advisable for libraries and other cultural heritage institutions to exclude this eventuality in the scanning contracts.

Database right

Producers of databases based in Europe have acquired their own form of protection, called the *sui generis* right or database right, by way of the 1996 European Database Directive. Whoever invests substantially in the obtaining, presentation or verification of the content of a database (which includes a website) acquires database right over the entire content. It makes no difference whether the content consists of Public Domain works or works in copyright. Database right is without prejudice to other parties' copyright in individual works, but it is an extra right that is created over the entire content of the database (Beunen, 2007). Thus, cultural heritage institutions can enjoy database right in databases and websites with Public Domain or other material. To secure the database right, it is wise for cultural heritage institutions to have scanning firms transfer their database right in the scanning contract.

The database right protects the investor against reuse by third parties of the entire database or *substantial parts* of it, without his/her permission. If a party reuses a non-substantial part, such as an individual Public Domain work, the database producer cannot prevent this on the grounds of his/her database right, even if it is for commercial purposes (although repeated and systematic reuse of insubstantial parts can amount to infringement).

Terms of use on the website

If the cultural heritage institution is not entitled to rights in scans of *individual* Public Domain works, it is doubtful whether the institution can prohibit reuse (commercial or otherwise) of scans from its website by means of terms of use. Existing Dutch case law is not unanimous on whether rights may be claimed to which one is not entitled on the basis of the law (Guibault, 2006). If a scanned work is indeed free of copyright, then its reuse can arguably not be constrained by terms of use. It is not uncommon

for cultural heritage institutions to set terms of use prohibiting commercial reuse without permission. Generally users do abide by these, but if the scanned material is free of rights it is unlikely that these terms could be legally enforced. Furthermore, if a heritage institution receives an order for scans and agrees terms of use with the customer, these conditions would only apply to the customer in question. If the institution cannot claim rights over the scans supplied, then everyone is free to copy them from the customer's publication.

As it is not currently possible to establish with certainty whether cultural heritage institutions (and/or scanning companies) can claim rights in scans of Public Domain works, technical protection measures are sometimes chosen. This is more effective in practice than trusting to whatever protection offered through intellectual property rights or terms of use. The most extreme measure is protection against copying. However, from the users' point of view this is undesirable, because thus a user cannot make a copy for his/her private use or study, whereas copyright law allows this even for copyrighted works. A less drastic alternative may be found in the museum sector: many museums place only low resolution images online to prevent commercial usage. Commercial parties must order high resolution versions whereas the low resolution images are good enough for users who wish to make a copy for private use or study. In the case of texts this is not an interesting option, however, as high resolution does not yield any added value (with the exception of illuminated books of hours and the like).

It is also possible to insert a non-intrusive logo or watermark of the institution in self-scanned material, under or above the text. In this way the institution can, in the first place, make clear that it has financed the digitisation itself, thus generating goodwill: it is clear to whom the credit belongs. Secondly, the institution can then supply scans without the logo to commercial parties by means of its delivery service.

Policy Considerations

Providing access to cultural heritage is a task that serves the public interest. Cultural heritage institutions participate in successful resource sharing cooperatives that make content widely available. Providing *access* free of charge

to Public Domain works seems an obvious course. The question we must address here is: do we wish to make Public Domain works online also freely available for every form of *reuse*?

The Public Domain Charter of Europeana and the Public Domain Mark, recently introduced by Creative Commons, argue in favour of such general free reuse. The principle of the Public Domain has been extended to *digitised* Public Domain works: a work that is free of copyright in its physical form should remain so in digital form. The Comité des Sages advocates for Public Domain works scanned through public funds: free access, free non-commercial reuse and the widest possible reuse possibilities for commercial parties.

Choosing to make self-scanned Public Domain works available online free for any reuse is a fundamental decision. It is irrevocable and will apply to all online types of Public Domain content that a heritage institution places or intends to place online. Everyone, including commercial parties, may then freely download and reuse this content digitised with public money.

Arguments for free reusability of online Public Domain works for every type of reuse

The public funding of cultural heritage institutions implies that free reusability is logical. For example, libraries carry out their tasks mainly with public money. This applies both to the acquisition of the collection and the execution of digitisation projects. The Public Domain principle argues in favour of totally free reusability: as soon as all rights have expired, reuse and modification of the material online must be free of charge and without any restriction. Copyright already lasts for a very long time (according to many, far too long) and after it has expired all practical and financial use impediments must be lifted. In comparison: the Open Access movement argues that information that has been created with public funds must be made freely accessible to the taxpayer. The definition of Open Access in the Berlin Declaration encompasses in addition to free *access* also free *reuse* 'for any responsible purpose'; this includes in any case non-commercial reuse and according to some also commercial reuse. Incidentally: if a customer orders scans/reproductions, for which the institution must perform activities and therefore incurs costs, it is logical that these costs are passed on to the customer. If one adheres to the Public Domain principle then — in the case of Public Domain

materials — nothing more than a cost-recovering fee should be charged for this service, both for non-commercial and commercial use.

Totally free reusability is advantageous for all types of users and promotes usage. Wider online distribution may be expected and wider brand exposure if scans carry the logo of the institution. Cultural heritage institutions may also regard it as their task to keep Public Domain materials freely accessible and available for use to counter the restrictive terms of use imposed by companies that exploit such content via Public-Private Partnerships with the heritage institutions.

It is an illusion to think that it is possible to maintain control over content on the Internet and over the quality and context of its reuse. The KB, for instance, currently relies on the goodwill of commercial users to request permission, but such permission is not legally required if the KB cannot claim rights in the scans of Public Domain works. Free reusability also avoids the problem of taking measures against commercial 'abuse': taking legal action in retrospect is not possible if the library cannot claim any rights in the scans.

With low resolution scans online, the demand for orders continues to exist: commercial parties wishing to receive high-resolution materials (and without watermark) in large bulk may continue to request these against payment.

Disadvantages of free reusability of online Public Domain works for every type of reuse

Because the choice for free reusability is a fundamental one, it is irrevocable and will apply to all Public Domain types of material scanned with public funds that the heritage institution chooses to put online.

The decision to make content freely reusable is not necessarily a financially viable one. It might destroy a potential source of substantial income.

Making Public Domain content that has been placed online freely reusable gives rise in a way to arbitrariness. This is because whether a Public Domain work is freely available for reuse would depend on whether the library has decided to scan it and place it online. Other Public Domain material could still only be ordered for a fee.

In the case of free reusability, a distinction needs to be made between Public Domain material scanned with private or with public funds. However, this distinction is not legally relevant: the free reusability of self-scanned material may cause users to also question the use restrictions imposed on content scanned by Public-Private Partnerships. These restrictions are legally untenable if no intellectual property rights rest in the scans (the database right only offers protection against reuse of substantial parts of the database). This is something users can already work out for themselves, but a clear distinction (Public Domain material with/without Public Domain Mark) will make this evident sooner.

Commercial reuse

Cultural heritage institutions need to find their way amid the tension between on the one hand facilitating optimal access and usage, and on the other developing cultural entrepreneurship (generating their own income). An alternative to free reusability could be a policy based on the principle of profit: charging costs for commercial reuse of digitised Public Domain works, whether they are online or not. The access to Public Domain material that the institution has digitised itself would then be free for everyone, as would reuse for personal study, education and research. However, for commercial reuse of this material prior permission would always be required and a fee would be charged.

Not making content freely available for commercial use has a number of advantages. It creates the possibility to monitor the quality of commercial reuse in advance and therefore prevents such reuse in a quality and/or context with which the library does not wish to associate itself. Furthermore, a low price threshold for commercial reuse is acceptable and offers the possibility of extra income, for instance by negotiating a beneficial deal for a library through packaging. In addition, as more Public Domain content is placed online, more downloads occur. If commercial parties themselves download the content to be reused, a cultural heritage institution will receive income without incurring additional costs for delivery of the content. Finally, in the perception of (a part of) the general public the content will acquire more value: “whatever is free is without value”, is an argument that still regularly plays a role (wrongly, as it happens) in Open Access debates.

Public-Private Partnerships

Digitisation is expensive and cultural heritage institutions are not always able to raise, in part or in total, the necessary funds themselves. Often they are dependent on their national government. The European Commission does not subsidise, or only to a limited extent, the digitisation of existing collections. The Comité des Sages too regards this, within the European Union, as primarily the responsibility of the Member States: “Member States will need to considerably step up their investments in digitisation” (Comité des Sages, 2011, p. 6). National governments have sometimes created programmes for financing digitisation activities, but these are under a great deal of pressure because of the economic crisis.

In such a situation, cooperation with a commercial party that can bear the costs of scanning can offer a solution. But such a deal often has a negative side: in order to earn back its investment a company usually negotiates some form of exclusivity in order to be able to exploit the scanned heritage commercially, for instance via subscriptions for libraries. This exclusivity can be agreed for a temporary embargo period, but embargos for an unlimited period also occur. This results in a temporary or permanent ‘digital lock-up’ of the own collection: although the cultural heritage institution receives its own digital copy, it is not (yet) allowed to make this available to the public, even though it often contains Public Domain content that — without these conditions of exclusivity — could have been placed freely online, unrestricted by any intellectual property rights. Unfortunately, this is precisely the reason why companies opt for Public Domain content when they embark on a cooperation with cultural heritage institutions: in this way their commercial exploitation of the cultural heritage will not be hindered by the copyright of other parties. The principle of freedom of contract enables them to subsequently negotiate exclusive exploitation in the contract with the cultural heritage institution (Beunen, 2010).

As noted above, financial considerations are usually the decisive factor for accepting this ‘digital lock up’: another party pays for the costly digitisation and in addition to scans the institution sometimes receives a percentage of the exploitation income and/or (temporarily) a free subscription to the scanned content.

The Comité des Sages has recently stressed again that Public Domain content in the analogue world should remain in the Public Domain in the digital environment. The exclusivity which the private partner may stipulate is

therefore an important disadvantage of public-private cooperation. The cultural heritage institution does get its scans, but is not yet allowed to make them available to the public because the company wishes to recoup its scanning investment by means of commercial exploitation. It is important to carefully consider how long one wishes to accept this 'digital lock-up'. A limited embargo period would seem to be the obvious route, as indeed the Comité des Sages argues. The Comité is of the view that an embargo period up to a maximum of 7 years is acceptable, which was also recommended by the European Commission in its 2011 Recommendation.

In practice, other alternatives may also be negotiated, such as free access for certain target groups or national IP numbers, so that the company can only exploit the material commercially abroad. On the other hand, such an alternative prevents aggregation by the European cultural heritage portal, Europeana. This is also the reason why the European Commission is opposed to the 'exchange' of a (longer) embargo period for access in the home country. Then again, the funding for the acquisition and/or maintaining of cultural heritage collections comes from national means: this makes it unacceptable for Public Domain material to be digitally accessible to national users only for a fee.

Viewed from a long-term perspective Public-Private Partnership are, nevertheless, certainly attractive for the institutions involved. On the one hand, the funds needed to scan materials oneself are not available and one is faced with a choice: not to have them scanned or to do via a Public-Private Partnership, where in the case of a temporary embargo the access restriction expires after a number of years. In other words: there is either no digital availability at all or a temporary, restricted one; one way or another, the user will eventually benefit from the latter option. For cultural heritage institutions whose task it is to preserve their collection, if possible 'for eternity', this argument applies all the more strongly.

They must, however, be alert to the fact that scans that are made by commercial parties do not always meet the quality requirements for digital preservation. Digitised material should preferably still be accessible in a hundred years' time. This is not a primary concern for the companies, but should be for the cultural heritage institutions. Therefore, it has to be preferred that the company involved does not get exclusive permission to scan material (or only for a limited embargo period), otherwise the possibility of self-scanning (to produce better quality scans) or having scans made by other parties is

completely excluded. It is also preferable if the scan activities are restricted to a clearly specified form of exploitation: granting carte blanche permission for any kind of (commercial) future form of exploitation is certainly not desirable. Finally, agreements must be made about what end users may do with the material that the company wishes to scan and exploit. Furthermore, it is not advisable to give the company permission to itself supply the digitised material (whether or not for a fee) to other parties for the purposes of reuse.

It is essential that the cultural heritage institution agrees with the selection of material to be scanned so that the company does not have a completely free hand in its choice of materials. In the case that access is restricted to national users only it is possible to negotiate that a certain percentage of the collections is made accessible worldwide. This may apply permanently to a fixed part of the collection, whereas for a different percentage of the material accessibility may vary for the benefit of, for instance, web exhibitions.

The Comité des Sages rightly points out that Public-Private Partnership agreements must be transparent and concluded by means of a written contract. So-called non-disclosure clauses are not acceptable. They prevent the terms from being subject to public accountability.

Policy of the KB

With the help of the above analysis and working within the framework of its recent strategic plan, the KB has formulated a policy for access to and reuse of Public Domain material.

The core business of the KB is to offer permanent access to everything that is published in and on the Netherlands. The most important policy principles for the KB are:

- Increase use of the collection by transitioning as quickly as possible to a digital collection and digital services. This implies acquisition of born digital material and digitisation of the printed collection.
- Increase use of the collection by cooperation with relevant partners in the information sector who have a direct relationship with the target groups of the KB; these include other research libraries and public

libraries. In this regard, the KB also wishes to strengthen the national infrastructure.

- Long-term preservation of the collection; in the case of digital storage, in cooperation with the other cultural heritage institutions within the framework of the National Coalition for Digital Preservation.

Reuse: Non-commercial and commercial

Two considerations are leading with regard to access and reuse of Public Domain material.

1. The KB is financed with public money and plays an essential part in making Dutch cultural heritage available, in cooperation with other cultural heritage institutions. This implies that the principle 'Public investment implies public benefits' has high priority for the KB.
2. The aim of increasing usage implies minimal impediments to that use, not only optimal technical accessibility but also as few financial or supervisory barriers as possible.

The conclusion is that the KB has decided not to impose any restrictions on non-commercial reuse of Public Domain material online scanned by public money. Moreover, the KB chooses for free reusability for *any* form of reuse, including commercial use. The KB does not regard commercial activities by private parties or other external initiatives as competition. If an external institution supplies added value to the freely accessible scans, the market will make clear whether users wish to pay for that. They will in that case pay for this added value; the Public Domain documents themselves will remain freely accessible via the website of the KB.

The KB's view is that it does not itself wish to undertake commercial activities with Public Domain material. Both the collection and the added value supplied by the KB with public money must be accessible to the public without cost. An exception is made at the moment for facsimile publications by third parties of valuable parts of the special collections of the KB. Such an activity does not interfere with the accessibility via the Internet, but is an additional activity that, if there is a demand for it, may be carried out for more than a cost-covering fee.

The KB is strongly against imposing restrictions that are underpinned by the argument that the future may bring new possibilities for a business of its own. Retaining to use restrictions only on the basis of the 'just in case' argument very often appears to be a serious obstacle to innovation.

The argument that the KB via use restrictions could monitor the quality of the reuse is not a convincing one. The KB is of the view that it is undesirable to monitor how customers use its collection or to formulate an opinion about the way the collection is used. This applies both to commercial and non-commercial use.

Nor does the KB share the objection that the public would ascribe a higher value to a collection if it is not made available free of charge. This argument is regularly used with respect to the Open Access movement: quality, however, is not determined by price but by the value of the content, which can be measured in a different way than a price tag.

The above considerations have led to the conclusion that the KB will not impose any restrictions on the commercial reuse of the Public Domain material which it scanned with public money. To make it clear that every reuse is allowed the KB intends to put this material online with the Public Domain Mark issued by Creative Commons. This organisation provides a standardised system of easily understandable terms of use. The PD Mark fits our purpose because it leaves any reuse free (www.creativecommons.org/about/pdm). The other available Creative Commons licences cannot be used for PD material since they can only be applied by rights holders to works in which copyright subsists.

Public-Private Partnerships

The KB has also concluded Public-Private Partnerships with regard to Public Domain material. The KB has insufficient funds to digitise its entire collection itself. There is a national programme called Metamorfoze for the digitisation of printed cultural heritage (www.metamorfoze.nl), but the emphasis here is on conservation. This means that the most vulnerable material takes priority and that is not, in most cases, the material prior to 1800.

In the first place, the KB has concluded a contract with Google for Public Domain material (1700–1870). The scanning is done on a non-exclusive basis,

so the library is free to have the same material scanned elsewhere. The selection is carried out by staff of the KB. Google does not charge a fee for access to the books it has scanned. The cooperation with Google is subject to a number of conditions. Books that are in the Public Domain in their printed form must remain in the Public Domain in digital form as well. This is achieved due, among other things, to the fact that the KB receives a copy of the scans, which it can make available through its own website as well as through Europeana. In this way the KB has also ensured that it can take responsibility for long-term storage, as Google does not offer any guarantees in this regard. This also means that users, who for reasons of privacy do not wish to access the scans via Google, have alternatives. Neither the KB, nor a third party are allowed to use the Google scans for commercial activities (which touches upon the issue of enforceability discussed in paragraph 2). Commercial activities are permitted if the KB or a third party makes its own scans. In other words: a certain exclusivity adheres to use of the Google scans, but not to the original books or other scans that are made of them. No non-disclosure has been agreed with Google, which means that the KB can offer public accountability for the content of the contract.

A second form of Public-Private Partnership has been concluded between the KB and ProQuest for our special Public Domain material (1450–1700), within the framework of the ProQuest programme Early European Books Online. ProQuest recoups the costs of the digitisation by means of a fee for access.

The KB has agreed the following with ProQuest:

- The KB receives a copy of the scans for long-term storage.
- A temporary embargo, after which the material is made available for free in Open Access, via among others the KB website.
- Complete access for users in the Netherlands during the embargo period.
- The KB may also offer permanent international access to a percentage of the collection (selected by the KB). In this way the KB can set up virtual exhibits about its top pieces.
- The KB may offer temporary international access to a percentage of the collection that may vary (selected by the KB), also for the benefit of temporary virtual exhibitions.
- A limited non-disclosure clause is agreed with ProQuest which allows the KB sufficient accountability.

An evident disadvantage of this cooperation is the financial barrier which foreign users experience when they access the collection. The alternative would, however, have been that the material could not have been digitised for the coming years. That is why the KB opted to make access to the Dutch target group a priority. This is the majority of the anticipated users. They are, moreover, the users who should profit the most from the adage 'Public investment implies public benefits', since the acquisition and maintenance of the collection have been paid with Dutch taxpayers' money.

Conclusion

Libraries and other cultural heritage institutions develop collections and maintain them for the most part with public money. They make the physical parts of collections that fall within the Public Domain available without financial restrictions. Collections which fall within the Public Domain in physical form should fall within the Public Domain in digitised form as well, certainly if they have been digitised with public funds. Public investment implies public benefits.

The law does not make clear whether a cultural heritage institution is entitled to copyright in scans made of Public Domain material. But even if this were the case the institution should make the material available free of restrictions for both non-commercial and commercial reuse, if the Public Domain material was digitised with public money. Value added by a commercial party justifies income for this party provided that the scans themselves remain freely accessible without restrictions at the heritage institution's website.

Public-Private Partnerships can offer an institution the necessary financial means for digitisation in order to increase usage of the collection. Some forms of Public-Private Partnerships entail a temporary embargo on free access. In light of the awareness that without such an agreement digitisation would be impossible, such temporary embargoes are acceptable. In the long term, permanent free access is realised in this way. By means of supplementary conditions (free national access, exceptions to the embargo) the advantages of such an agreement may outweigh the evident disadvantages.

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