

“Out-Of-Commerce” Works and non-EU authors under the EU Directive on Copyright in the Digital Single Market

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Which works will be included in licensing or exceptions for “Out-Of-Commerce” works?

1. Works held by libraries and archives in print formats (books, newspapers, periodicals, etc.) and digital formats (archives of Web content, etc.).
2. Works that are already being actively exploited.
3. Works first published outside the EU (if included in a collection with works published in the EU).
4. Works by non-EU authors.



Will licensing or exceptions for “Out-Of-Commerce” works benefit authors?

For some works, yes.

The author will benefit if:

1. The author wants to have the work copied,
2. There is a licensing scheme available, and
3. The author is not already exploiting the work in some other way which they prefer, or which they want or have already agreed to keep exclusive.

Will licensing or exceptions for “Out-Of-Commerce” works benefit authors?

For some works, no.

The author will be harmed if:

1. The author doesn't want the work copied (obsolete versions, outdated works, poor-quality works, etc.);
2. The author already is exploiting or has licensed the work in some other way which they prefer; or
3. No collective licensing agreement is available, so the fall-back exception is unremunerated.



Will this result in violations of the Berne Convention rights of non-EU authors? Yes.

The Directive includes provisions that are supposed to protect non-EU authors, but they are a sham.

1. Works by non-EU authors or first published outside the EU are supposedly excluded, but:
 - A. Often you can't tell an author's citizenship or residence from a copy of a work or from bibliographic metadata.
 - B. Often you can't tell where a work was first published (especially if published on the Web or digitally).
 - C. Non-EU works can be included if they are grouped together with EU works in a collection.



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Was this book first published in the EU?
Are all of the authors EU citizens or residents?
Typically, you can't tell from the copyright notice.

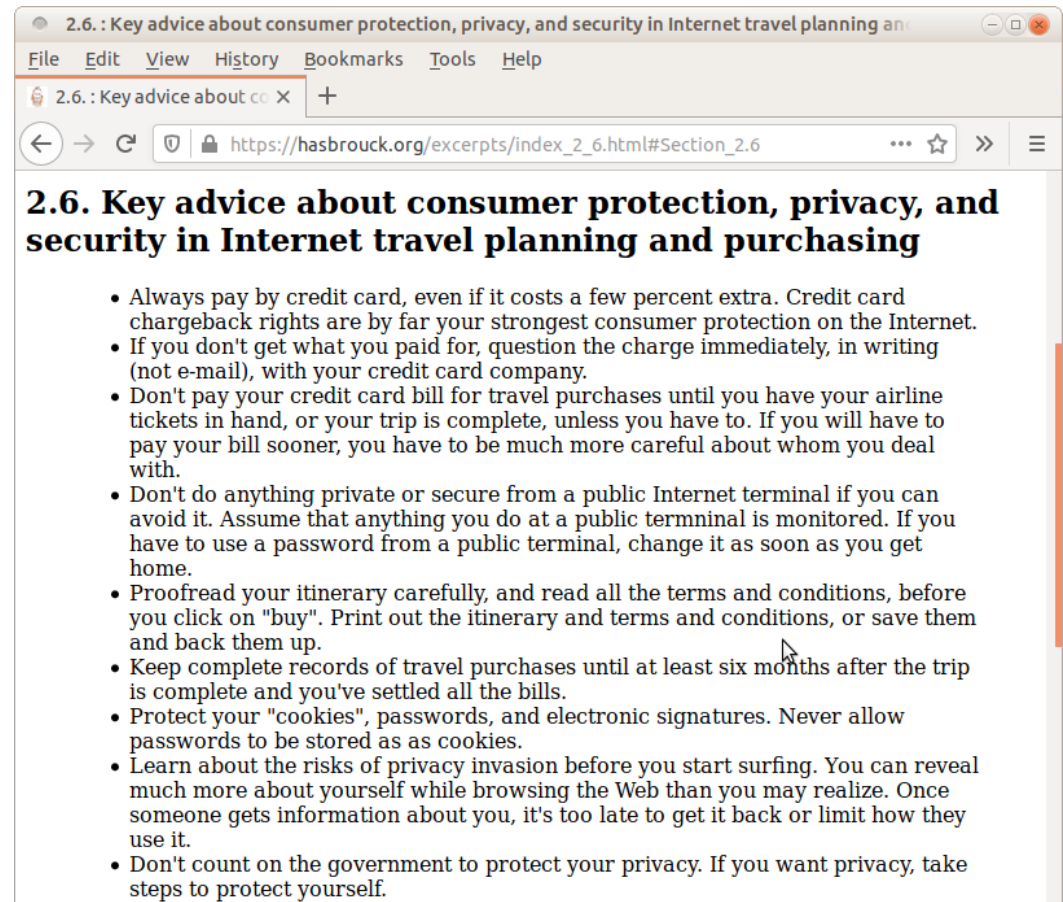
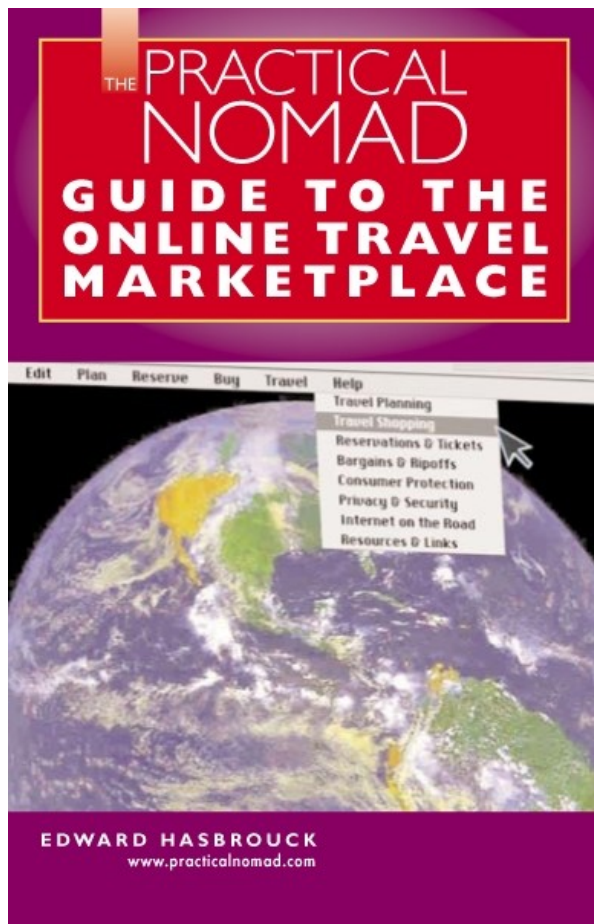
Will this result in violations of the Berne Convention rights of non-EU authors? Yes.

2. Authors supposedly can “opt out”, but:

- A. Is a requirement to opt out a formality prohibited by the Berne Convention? (The NWU believes that it is.)
- B. Will opting out really be easy and effective? (Opting out from current “orphan works” and ECL schemes has typically been neither easy nor effective.)

What can be done in the implementation of the EU Directive on Copyright to mitigate the damage to authors' rights?

1. Definition of “customary channels of commerce”.
2. “Easy” and “effective” opt-out procedures.
3. Stakeholder dialogue.



The book at left is “out of print”, but portions of its content are on the Web site at right.
Is this work “out of commerce”?

What are “customary channels of commerce”?

The definition needs to be inclusive.

“Customary channels of commerce” include:

1. Diverse formats: Print (books, periodicals, etc.) and digital (Web content, e-books, paid downloads, e-mail newsletters, mobile apps, etc.)
2. Diverse revenue sources: Sales, licensing, advertising, subscriptions, etc.

See NWU presentation to US Dept. of Commerce workshop, “How Writers Monetize Words”:

<https://nwu.org/how-writers-monetize-words-the-marketplaces-for-writing-in-digital-formats/>



Principles for defining “customary channels of commerce”:

1. The same work can be commercialized in versions with different format, title, structure, revenue model, etc.
2. “Not available for sale or licensing” does not mean “not being exploited”. (Other customary modes of monetization include Web and in-app advertising, etc.)
3. “Not available in the original format” does not mean “not being exploited”. (A work first published in a book may be available on a Web page or pages, or vice versa.)
4. For Web content, “not available at the original URL” does not mean “not being exploited”.

Opt Out:

Article 8 (Out-Of-Commerce works)

4. Member States shall provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set out in paragraph 1 or from the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.

Article 12 (ECL)

(c) rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism established in accordance with this Article; and

What can be done to make opt-out “Easy” and “Effective” for authors?

Elements of opt-out procedure required by EU Directive on Copyright in the DSM:

1. Opt-out for all works or specified works.
2. Opt-out at any time.
3. Opt-out for any rightsholder and work, which implies that opt-out must be possible for anonymous authors and works.

What can be done to make opt-out “Easy” and “Effective” for authors?

Not mentioned in EU Directive, but necessary for opt-out to be “easy” and “effective”:

4. Opt-out directly through EUIPO portal (functional portal, not merely informational).
5. One-stop opt-out for all EU member states.
6. Integrated with opt-out from “orphan works” and all other ECL licensing schemes.

Article 11: Stakeholder dialogue

Article 11

Stakeholder dialogue

Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 8(5), and shall encourage regular dialogue between representative users' and rightholders' organisations, including collective management organisations, and any other relevant stakeholder organisations, on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms set out in Article 8(1) and to ensure that the safeguards for rightholders referred to in this Chapter are effective.

- Will non-EU authors be recognized as stakeholders and included in this dialogue?
- Will remote participation be possible?

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