

**Insects and Fruit**  
Jan van Kessel  
1660 - 1665, Rijksmuseum  
Netherlands, Public Domain

# Europeanana

## A BETTER SOLUTION FOR OUT OF COMMERCE WORKS

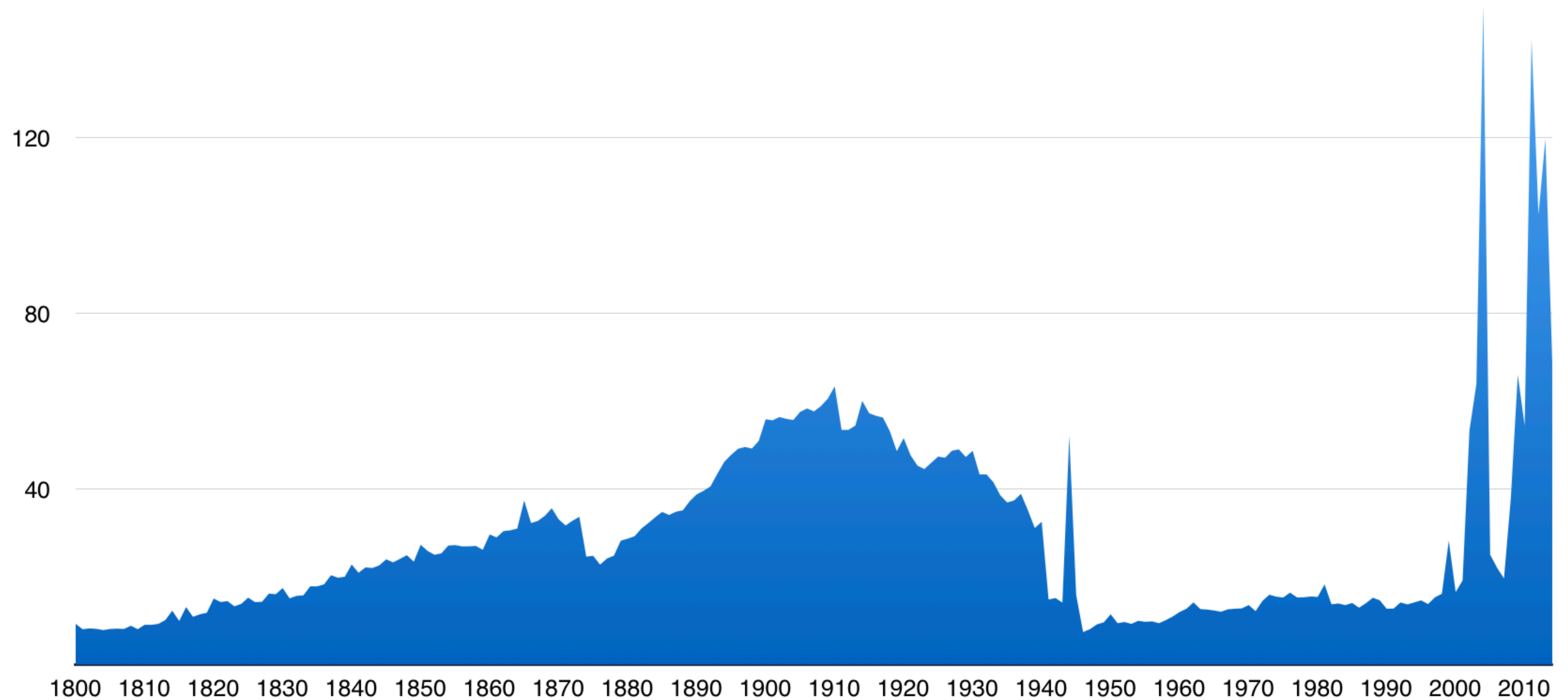
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# The problem:



# Out of Commerce works

The Commission's proposal for a Copyright in the Digital Single Market Directive, proposes to address the 20th century black hole problem with a licensing mechanism for Out of Commerce Works.

This mechanism would work by requiring member states to introduce legislation, allowing collective management organisations to issue licenses that: "may be extended, or presumed to apply, to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation"

# The Commission's proposal (1)

- The proposal is overly complicated and burdensome and as a result the measures proposed by the commission will not significantly lessen the efforts required to clear rights enough to have a real impact.
- Licensing will not work in all sectors and for all types of works. We need a solution that also works in sectors and types of works without a collective rights management practice.

# The Commission's proposal (2)

- The role of the database to be maintained by EUIPO (and by extension the ability to opt out) seems underdeveloped in the Commission's proposal.
- The recent ruling in the Doke and Soulier case (CJEU C301/15) has cast significant doubt on the legal feasibility of the approach proposed by the Commission

# A better solution for OOCW

We propose a more comprehensive solution for the Out of Commerce works problem that consists out of the following three elements:

1. Improving the licensing language proposed by the Commission
2. Adding a back-up exception and a non-applicability clause
3. Strengthening the opt-out mechanism



# (1) Improved licensing

Maintain the existing articles 7-9 proposed by the Commission but modify them in order to ensure:

- that individual translations (and manifestations) can be considered to be OOCW on themselves.
- that collective management organisations are able to issue licenses for all works held by cultural heritage institutions in their country.

# (1) Improved licensing

- These interventions are intended to ensure that the proposed licensing based approach will have practical utility for both cultural heritage institutions and collective management organisations.
- Without making these modifications will have to undertake significant efforts to establish the provenance of individual works in their collections before they can attempt obtain licenses



## (2) A back-up exception

- Add a mandatory exception that allows CHIs to make available out-of-commerce works in their collections online for non commercial purposes.
- Add a clause similar to the Art 4.2 that requires Member states (in consultation with stakeholders) to ensure that the exception does not apply in sectors and for types of works, where licensing based solutions are available or can be expected to become available.
- the exception needs to uses the same definition of OOCW as the the licensing provision and is subject to the same publicity and opt out requirements as laid out in art 8.



## (2) A back-up exception

Adding an exception will ensure that Out of Commerce works in sectors without collective management practice can be made available by CHIs.



# Licensing vs Exception in practice

The scope of the exception would be decided on the member state level in consultation with rightsholders and cultural heritage institutions:

- Sectors with collective licensing arrangements (text based works, photography, visual arts) would be excluded from the exceptions
- Types of works where specific licensing practices exist (such feature films, other commercially distributed AV works etc could be excluded)
- The exception would only apply to types of works (for example amateur films, political campaign posters) or sectors where there are no licensing arrangements.



# (3) Stronger opt-out

We propose to strengthen the opt-out mechanism, by making it part of the EUIPO maintained portal referred to in art 8.2 of the proposal:

- Rights holders need to get the ability to register their opt-out on a per work and on a per-rightsholder basis.
- The portal needs to provide functionality to alert right holders based on search terms and to search for works via automated content recognition.



## Flowers

Anonymous

1700 - 1799, Rijksmuseum

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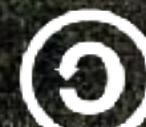
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