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## **PUBLIC CONSULTATION “EUROPEANA - NEXT STEPS”**

### **GESAC'S CONTRIBUTION**

#### **Questions for consultation**

##### ***General***

Digital technologies open up untold prospects for the preservation and dissemination of the cultural heritage, and GESAC - which links together 34 authors' societies in the European Union, Norway and Switzerland, thereby speaking for more than 500 000 authors and copyright holders across all fields of creative output: music, graphic and plastic arts, audiovisual, literary and dramatic works - cannot but welcome the Europeana project.

##### ***Question 1***

*Which orientations would you suggest for the future development of Europeana as a common access point to Europe's cultural heritage in the digital environment?*

##### ***Question 2***

*Which features should be given priority in the further development of the site?*

Operating within established Community and international copyright rules (see answers to questions 7 and 8), Europeana has a key role to play in showcasing the European heritage and promoting copyrighted content.

##### ***Question 3***

*Has Europeana struck the right balance between making Europe's digitised cultural heritage searchable through a common entry point and at the same time giving visibility to the institutions that contribute the material, or should the material accessible through Europeana be presented in a more unified way?*

##### ***Question 4***

*How should Europeana further develop its own autonomous identity?*

### **Question 5**

*Should there be minimum requirements for the content brought into Europeana by the contributing organisations (e.g. minimum viewing or use options)? If so, who should be responsible for defining and imposing these minimum requirements?*

## **Content for Europeana**

### **Question 6**

*Which categories of content are so important for the users that Member States and their cultural institutions should be encouraged to make them available through Europeana? What measures can be taken to ensure the availability of these works through Europeana?*

### **Question 7**

*What is the best way to encourage cultural institutions and rightholders to take into account cross-border access - including through Europeana - in their agreements on digitisation and dissemination of in-copyright material? Which legal or practical barriers to this cross-border access need to be addressed?*

Under the exceptions granted to them<sup>1</sup>, libraries can only distribute copyrighted works over their Intranet. They may not distribute copyrighted works in the country in which they are established, and especially not across borders. There is no internal market issue here. The reason for this restriction is to prevent libraries and other cultural institutions entering into direct competition with economic operators in the cultural sector. The real emerging issue here is the role of libraries and how they exist alongside economic operators. Care must be taken here not to undermine a sector of activity whose importance to the European economy - financially and in terms of jobs - is established beyond doubt. At the end of the day, the entire diverse range of independent European creative output would be undermined, which surely cannot be the objective.

Should libraries wish to engage in activities that compete with those of economic operators in the cultural sector, they cannot then benefit from an exception but must acquire the requisite contractual licences from the rights holders or the societies that represent them.

Being a not-for-profit entity is no reason in and of itself, because authors should not have to bear the full cost of cultural, research and education or social policies. These policies must be paid for by society as a whole.

The role of libraries and other institutions in the Internet age, and how they see themselves going forward, would repay more thorough discussion.

One way of promoting national or cross-border access to copyrighted works via libraries and other cultural institutions would be for them to list the titles of copyrighted works on their websites with links pointing to legal sites where these works can be accessed.

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<sup>1</sup> *The 2001 Copyright and Related Rights in the Information Society Directive lays down specific exceptions to reproduction and communication rights (articles 5.2.c and 5.3.n). These exceptions allow publicly accessible libraries, educational establishments, museums and archives to digitize works for preservation purposes and to make them available for the purpose of research or private study on their premises using dedicated terminals.*

### **Question 8**

*How can the difference in the level playing field for digitizing and making accessible older works between the US and Europe (in particular the 1923 cut-off date in the US, that places all material from before 1923 in the public domain) be addressed in a pragmatic way (e.g. better databases of orphan and out-of-print works, a cut-off point that imposes lower requirements for diligent search in relation to orphan works)?*

Like the United States and elsewhere in the world, the EU has specific rules on the term of copyright protection. These rules apply throughout the EU regardless of the origin of the work. A US work is subject to the same rules as a European work on European territory, and hence enjoys the same term of protection. Europeana is a European service intended mainly for European citizens, and as such must comply with the European rules for services provided to European citizens. The differential term of protection would be relevant only were Europeana to be accessible to citizens of the US or other countries, in which case Europeana would have to comply with the rules in force in those other countries, just as outside operators work to European rules when seeking to provide services in Europe.

One thing that cannot go unmentioned in relation to orphan works is the discussions carried on in the working groups set up by the Commission which culminated in the signing on 4 June 2008 of a Memorandum of Understanding on the guidelines on diligent search for rights holders before orphan works are used.

These guidelines are a practical tool to help identify and locate rights holders. They are not intended to address issues like licensing mechanisms or the conditions of licenses. Different initiatives on these matters are under way in the Member States, and it will be important to work out criteria that are acceptable to and recognized by all countries.

The Commission-sponsored discussions carried on in 2008 established that not all content creation sectors (graphic arts, music, literature and audiovisual works) are affected by the issue of orphan works to the same degree. A “one size fits all” approach would not work, therefore. The music sector, for example, has the singular characteristic of being mainly under collective management. Most musical works are registered with authors' societies, and orphan works are, to the best of our knowledge, a marginal issue, if one at all. Musical rights societies have regularly updated, very complete databases which enable rightholders to be easily found.

The societies that manage graphic arts rights also have a network of databases that can facilitate searches on orphan works, and this militates in favour of introducing a mandatory remunerated collective management system into a sector where orphan works are particularly prevalent. Blanking-out images during scanning of works is not a satisfactory solution. Some books are specifically designed to include images and removing them may infringe the book designer's moral right.

It is important to note that - recent contracts for commissioned works aside - the digital rights in graphic and plastic artworks have never been assigned to publishers, and that the rights in existing works still remain vested in the rights holders. The point also has to be made that works whose text is in the public domain and works regarded as orphaned may still contain copyrighted illustrations.

Mandatory collective management is the only solution capable of offering libraries legal certainty while also ensuring that rights holders are remunerated.

Where orphan works are concerned, GESAC is adamantly opposed to a mandatory exception

that would undermine copyright. GESAC is also against the idea of a cut-off point. The fundamental principles of the Community acquis, and especially the principle of the rights holders' prior consent and automatic protection without formalities, must be complied with. Respect for authors' moral rights is also essential.

The management of orphan works must take full account of the economic impact on copyrighted works. The distribution of orphan works may diminish the value of copyrighted works, so that remuneration is essential to avoid a distortion of competition with other works and so that libraries do not enter into competition with commercial partners. There is no good reason for remunerating an orphan work and a work by known rights holders differently, any more than for drawing a distinction between commercial works and non-commercial works: non-commercial works may acquire a high economic value.

### ***Question 9***

*What policies should be adopted to avoid that the process of digitisation itself creates new types of sui generis copyright that, in turn, could create barriers to the dissemination of digitized public domain material?*

Work done by private or public organizations that costs time and money and meets the criteria is entitled to protection, but obviously does not give the organization that has done it rights in the works themselves.

Digitization is a costly business for which libraries do not always have the funds. European funds might possibly be used to promote initiatives to digitize public domain, out-of-copyright works, thereby ensuring their preservation, future availability and completeness.

### ***Question 10***

*What measures can be taken to ensure that cultural institutions make their **digitised public domain material** accessible and usable in the widest possible way on the Internet? Should there be minimum requirements for the way in which digitised public domain content is made available through Europeana?*

## ***Financing and governance***

### ***Question 11***

*Which financing model would reflect a fair distribution between Community funding, Member States' funding and private funding, taking into account that the aim of Europeana is to give the widest possible access to Europe's cultural heritage at pan-European level? Could Europeana be financed solely by national cultural institutions or by private funding?*

### ***Question 12***

*Is sustained European Union funding for the basic operations of Europeana necessary and justified for the period after 2013? What type of European funding instrument could best be used?*

**Question 13**

*Which governance structure for Europeana would best fit the preferred financing model (as indicated under question 11)? Should there be a role in the governance structure for organisations other than content providers?*

**Question 14**

*How can private involvement in Europeana best take shape (e.g. through sponsoring, through technological partnerships, through links from Europeana to the sites of publishers and other rightholders where the user can buy in-copyright content, or through another type of partnership)?*

**Question 15**

*How can private sponsorship of Europeana best be stimulated? Are commercial communications on the Europeana site acceptable, and, if so, what type of commercial communications (e.g. logos of sponsors, promotion of specific products)?*

**Question 16**

*Should there be a contribution (financial or other) in exchange for the links from Europeana to sites with content for which the user has to pay? Can a model such as that of Gallica 2, providing links from the site of the Bibliothèque Nationale de France to the content on the sites of French publishers, be transposed to Europeana?*