

## QUESTIONNAIRE EUROPEANA – NEXT STEPS

CEPIC, the Coordination of European Picture Agencies thanks you for the opportunity to respond to this European initiative. As an European Economic Interest Group representing the commercial and non-commercial interests of over a thousand photo libraries, news agencies, art galleries and museums we are able to offer considerable insight into this project.

Our members are producers, collectors and distributors of content – moving and still images- and we are well versed in dealing with rights issues such as the right to reproduce, moral rights of authors and the global distribution of assets for commercial and non commercial use. We have been digitising content for over 15 years, and making the resulting digital asset available for commercial use, such as to newspapers, magazines and broadcasters as well as in non-commercial environments for the purposes of research and education.

Our membership comprises some of the most distinguished national museums in Europe, (some of whom have been directly involved in EUROPEANA), the leading owner-managed agencies, as well as the worlds leading commercial institutions, publishers and broadcasters.

Our membership also comprises major news agencies. News photographs of today gain documentary value with time. News agencies hold collections of world famous photographers who are an integral part of European cultural heritage.

Drawing on the expertise of a commercially orientated and pan-European membership from over nineteen European countries, we have also undertaken a considerable amount of work in standardisation from metadata to legal agreements.

As such, we are best placed to understand the potential benefits for researchers and for the public and welcome the EUROPEANA initiative of the European Union. We support EUROPEANA as a not-for-profit project aimed at education and research and see this as a platform for greater access to cultural heritage.

Alongside the need for access comes the need to support the creative economy that produces and delivers this work, namely the artists and those that make their work available. CEPIC supports any initiative which will allow for the controlled use of “free content” whilst supporting, managing, protecting opportunities offered by the market to make this content available commercially and for commercial use. In these commercial instances our imperative is to ensure that the creator is the beneficiary of direct payment over collective management of rights.

CEPIC welcome the initiative of the European Union as a way to take EUROPEANA to the next stage. EUROPEANA should become a label of quality to researchers seeking access to the European cultural heritage, quality material and reliable data information.

Many of our members are in a position to propose quality image material from the birth of photography to now. CEPIC could be a partner to EUROPEANA, offering support in terms of IP management, advice in technology, finding image partners in Europe and creating European rights agreements.

In terms of intellectual property, our major concern is that any badly crafted orphan works legislation might worsen the situation for rights owners. In this regard, we believe that we need a clear definition of what is an ‘orphan work’. We need a control over this definition. In addition we require better enforcement of moral rights as a way to avoid the creation of future orphan works. Not only do we need standardised and interoperable metadata in order to improve access to images and the exchange of visual material, but our foremost need is legal recognition of metadata contained within an image as of proof of ownership.

## CONTENT FOR EUROPEANA

### ***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?*

We like further clarification from you about how you define 'minimum requirements', 'minimum viewing' and 'use options'.

We believe that EUROPEANA should work alongside standards bodies, to create a forum that brings together experts in the areas of rights, technology and metadata, in order to offer prescriptive guidelines and best practice to its constituents.

Users of content would benefit from clear definitions of commercial and non commercial use.

### ***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?*

We feel that the focus of EUROPEANA would benefit from content from specialist collections. These frequently hidden resources offer a rich and deep insight into cultural heritage.

### ***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?*

In our view, one of the most important areas to be addressed is the lack of harmonisation of copyright law as applied to photographs. For example, a 'documentary' photograph will be protected in Germany and Sweden for 50 years after publication, but 70 years p.m.a. in the UK and for the same length of time in France dependent on its level of 'originality'.

We see EUROPEANA as an ideal vehicle for the dissemination of information, including template legal agreements, rights information, metadata and technical standards and other resources to support cross-border distribution.

We would encourage EUROPEANA to disseminate information about best practice in the area of the use of content, diligent search and copyright. For example, content providers could benefit from clear definitions of copyright, 'rights holders' and 'diligent search', 'orphan work'.

Providing guidance on 'best practice' and other resources would enhance the standing and status of EUROPEANA and help attract more users and content providers to the site.

**Question 8.** *How can the difference in the level paying 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 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)*

The question raises the larger issue of orphan works, also their relation to public domain works.

We are aware that EUROPEANA contains content which is both in the public domain or in copyright and has potential rights issues. One pragmatic way to address the existence of disparate copyright law and term is for EUROPEANA to encourage its suppliers to provide detailed rights information about the object. This will greatly assist and protect the user. We would suggest that in discussions of about a cut off date, it is essential to define what kinds of work that are under discussion as well as the date of creation or publication

Promoting greater awareness of copyright will be of benefit to users and content providers.

In general, we believe that any “pragmatic” harmonisation with the USA cut-off date of 1923 can only lead to confusion.

Whilst we recognise the deadlock caused by orphan works for libraries wishing to digitize their works in order to make them accessible to the public, we believe that the issue of mass digitization may be solved within the present legal framework of copyright and authors’ rights.

### **Our members and orphan works**

Picture agencies also hold orphan works in their files. In contrast with libraries there is a commercial imperative on picture libraries to track down rights holders and they usually have the means to do so. Furthermore picture agencies and libraries will have had an initial link with the rights owner in connection with the management of their work. In instance where the author may be temporarily untraceable, e.g. because of a change of address, picture agencies will often retain the contractual right to represent that author and (the reproduction rights in) their work. In these cases civil remedies suffice. As a result, our industry is able to manage orphan works in a way that other organisations cannot.

This is why orphaned works have never been identified as a major issue by our membership or by the image industry at large, until recently in relation to the Orphan Works Bill in the USA.

Our member agencies have noticed that users often confuse **orphan works** with **works in the ‘public domain’ or works which are out of copyright**. In some cases, we do not know whether an orphan work is in or out of copyright. In addition, as in some cases the nationality of the author may be uncertain, the territory which defines the term of copyright may also be called into question. There is, however, a major difference: in the case of works in the public domain, the author will never come back to oppose the use of his work or demand payment, whereas the “parent” of the orphaned work may re-appear at any moment.

It is in the best interest of the user not to blur the boundaries between orphaned works and public domain works. It is also the best interest of the researchers in Europe to receive the most reliable information on works.

## The implications of “lower requirements for diligent search”

Your question (8) implies that lowering the standard for diligent search will reduce the problem of orphan works. However, diligent search itself is required in order to establish the status of a work. The scope of the search will determine whether a work is “orphaned” or not “orphaned”. In the interests of rights holders and users, it is critical that we define the scope of this search.

As the recent hearing organised by the European Commission on 26 October 2009 showed, users of content make many assumptions about orphan works.

### Assumption 1

There seems to be a general feeling that orphan works exist because the author takes less interest in those works. This assumption is wrong, particularly in the field of photography a work may become orphaned for a number of reasons :

- lack of crediting on publication
- metadata stripping (often via a firewall)
- change of address
- change of name because of marriage
- closure of the publishing house or agency
- use on internet without proper crediting
- lack of control over third party use

None of these reasons point to a lack of interest of the author.

### Assumption 2

- The author’s intent for his / her work has an impact on its commercial value and use. If the author had originally no intention to use the work for commercial gain :
  - it can be made accessible to the public without authorizationand
  - used for commercial purposes.

The will of an author may change with time. Moral rights are about authorizing or prohibiting such uses. Assuming what the author thinks, potentially infringes his / her moral rights.

Moral rights are central to the issue of orphan works, yet the debate has been sublimated by a commercial imperatives or a desire for wider distribution. The right to reproduce an image co-exists with the right of an author to permit or prohibit the use or publication of their work. This reinforces the need for due diligence.

## **Orphan works legislation**

All of these elements lead us to say that we need a general solution for “orphan works”, not just one which solves the issue of works published before 1923. The solution should address both digitizing of older works AND the future usage of these works.

### CEPIC Recommendations

1. That EUROPEANA sets standards in crediting any images (from its site) in print and in the digital media and enforces these. This act will reduce the creation of future orphan works and show a respect for content creators
2. Education. CEPIC would welcome EUROPEANA’s support in communicating that images often contain layers of rights. For example some images may also have the following right: personality, privacy, integrity, attribution, trade mark, and building, to name a few.
3. That EUROPEANA promotes industry digital standards including metadata, image tagging (and other accessibility issues for visually impaired)
4. That it considers a consistent approach in the presentation of content by contributors a consistent approach to enhance the experience for the users.

We would also suggest that EUROPEANA commissions or works closely with CEPIC to create model contracts and clauses that facilitate the movement of content across European in non commercial settings.

In conclusion, what we need are:

- a) Clear definitions of :
  - ‘Orphan Works’
  - “Diligent Search” (which must be documented)
  - ‘Commercial Use’ / ‘non commercial use’
- b) Standards harmonisation and legal recognition of these standards
- c) Consistency of process at European level

## **“Better databases of Orphan and out-of-print works”**

CEPIC recognises the need to establish a central orphan works repository and to promote a database which holds information about rights holders – e.g. WATCH. The integration of information across commercial and non commercial databases will result in the reduction of orphan works, and increase awareness of rights owners and establishing works in and out of copyright.

We also believe that a realistic approach to set up such a database could be to use the existing databases of photo agencies and picture libraries. Many pictures which appear to be “orphan works” on the internet may be found in existing image databases together its associated rights information.

## **FINANCING AND GOVERNANCE**

### **Question 12**

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

### **Question 14**

How can private involvement in Europeana best take shape (e.g. through sponsorship, through technological partnerships, through links to Europeana to the sites of the publishers

### **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 sponsor, promotion of specific products)

Many CEPIC member agencies are active in the preservation of European cultural heritage and these assets do not exist within the wall of cultural heritage institutions. Many have built substantial databases of works and on information on these work.

CEPIC would like to encourage EUROPEANA to research the potential for public private partnerships. For example, a SWOT analysis of extended relationships between EUROPEANA and our member agencies.

We think that support from professional entities may in fact enhance the quality of EUROPEANA as service and content, with complete crediting of picture material including all artistic rights and professional translation of the caption in several languages.

All kind of partnerships or sponsorship, to ease financing, is acceptable as long as political, commercial governance is not tampered and copyright and competition rules are respected. It is important that Europeana sets its own terms for this purpose.

In particular :

- Opt-In copyright should remain the rule
- Moral rights can only be infringed in exceptional cases (orphan works following the above criteria)
- There should be no exclusivity clauses
- There should be no exclusivity to access but access should be monitored via guaranteed registration

In defence of copyright and competition, we are in favour of an opt in position (i.e. as distinct from that proposed by the Google Book Settlement, where by content providers are required to actively opt out of the scheme.) We believe that opt-out is unfair to the individual rights' holder and in the long term damaging to creativity.

CEPIC accepts that sponsors want acknowledgement in return for their financial support, but is concerned if this extends to overt product placement or commercial promotion or more extensive demands. The Commission should be careful in promoting specific products or services of any company.

**THE END – 15.11.09 –**