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## **Submission to the consultation “Europeana – Next Steps”**

Brussels, November 2009

AEPO-ARTIS represents 29 European performers’ collective rights management societies from 22 countries. Combined, these societies have in excess of 350,000 performing artists (such as musicians, singers, dancers, actors) as members and manage the rights of some 400,000 performers in Europe.

### Preliminary Remarks

This submission is limited to how Europeana impacts upon the rights of performers and the collective management organisations in charge of their administration. The materials available via Europeana which are directly relevant to performers are the audio and audiovisual fixations of performances. Other materials such as literary works and still images raise separate questions, which require a different approach in many areas. Therefore, we support the idea of a sectoral approach whereby the issues applicable to the different categories of material available are looked at separately. AEPO-ARTIS would need to be consulted particularly for those questions relating to audio and audiovisual content.

### **Questions for consultation**

#### **General**

##### **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?*

As well as being a place for members of the public to explore European culture, the site should also be a means for the performers of music, films and other material to be fairly recognised while their material is made readily accessible to the public.

Potential mutual benefits between performing artists and other cultural institutions like libraries and archives should be pursued.

Europeana is an ambitious project, based on public initiatives and funding, which may undoubtedly gain worldwide visibility. For these reasons, it should be designed in a way that it could serve as a model for any other similar initiatives in the future.

A crucial element for the future development of Europeana is the management of the intellectual property rights relating to the millions of works and other subject matters to be digitized and made available.

In this respect, it is essential that IP rights, and in particular performers' rights, are fully respected; that the right-holders' prior authorisation for any use that does not fall into the scope of exceptions provided by European law be respected (for content that is still protected); that the licensing of these rights is facilitated by recourse to collective management and, as regards the treatment of orphan works or performances in particular, by fully implementing a diligent search for right-holders in good faith as described and agreed upon in the memorandum of understanding of May 2008.

This document was created by stakeholders at the initiative of the European Commission. It was agreed upon by representatives of both holders of rights in creative works and fixations and users like libraries or archives.

When it comes to making copyright protected content available to the public, attention should also be paid to avoid the introduction of any competition distortion or any measure that would result in fragilising a nascent market where legal offers for accessing and using music, films, books and other creative content via the Internet are being developed by content and service providers.

## **Question 2**

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

A clear description of the uses foreseen should be displayed on the site and communicated to all parties concerned, in order to have attached to it a clear and reliable contractual basis for managing the rights linked to these uses.

This should ensure prior authorisation is systematically sought and remuneration is paid to performers whenever use is made of their performances that are not in the public domain, and that their moral rights are respected.

With regard to moral rights, it is particularly important that sufficient steps are taken to ensure that performers are clearly identified whenever one of their performances is displayed on the website, or on another site linked to Europeana.

The current Terms of Services<sup>1</sup> of Europeana provide the general framework for the site, although we appreciate that they contain the disclaimer "*Europeana.eu is a 'prototype', therefore the following term and conditions have yet to be subjected to a full legal study*". We are also aware that in the document "*Annex 1, Description of Work, (Thematic*

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<sup>1</sup> <http://www.europeana.eu/portal/termservice.html>

Network) ECP 2008 DILI 558001 Europeana v1.0, version of 16/01/2009”<sup>2</sup> one of the tasks envisaged is to create a list of legal issues in need of resolution and that these include “e.g.: Copyright, IPR, Terms of Use for Europeana, Use of Creative Commons, integration of user generated content, permitted reuse, licensing and partnership agreements (...)” We note that the intention is to “deliver a Europeana Content License to WP2 by January 2010”.

Regardless of the “interim” nature of the Terms of Service we believe it is important to state that they have to meet the requirements of the law applicable for performers. In particular, these terms currently available seem to disregard performers’ rights in several ways. The following is an example of one possible failing in the current Terms of Service which we hope shall be rectified in the forthcoming Europeana Content License.

Under the heading “Permitted Use”, the following is stated:

*“Members of the public may access the open parts of this site in accordance with these Terms and Conditions. Europeana.eu will give a user access to digital objects and material of the content partners of the service (...) Users may also save web pages or objects electronically for personal use.”*

“Europeana” itself, insofar as it hosts protected material, should take all necessary measures to avoid infringing performers’ rights, notably their exclusive right to authorise or prohibit the reproduction and making available to the public of fixations of their performances<sup>3</sup>.

The invitation to save objects electronically for personal use suggests that Europeana is purporting to authorise users to download (to reproduce and to make available) material such as sound or video clips. The conditions for allowing such use are unknown and clarifications in this respect would be needed.<sup>4</sup>

In addition, should performances be “streamed” via the website in the future, the performers’ right pertaining to the broadcasting and communication to the public of their performances<sup>5</sup> should be respected.

AEPO-ARTIS would state that the Europeana terms of use should abide by the legal framework and commercial rules in application in Europe.

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<sup>2</sup> Available at [http://version1.europeana.eu/c/document\\_library/get\\_file?uuid=75469328-65e7-4913-88da-4c6697851958&groupId=10602](http://version1.europeana.eu/c/document_library/get_file?uuid=75469328-65e7-4913-88da-4c6697851958&groupId=10602)

<sup>3</sup> Set out in Article 3.2 of Directive 2001/29/EC : “Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: (a) for performers, of fixations of their performances;”

<sup>4</sup> More specifically, provisions of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society notably state in article 2 that performers have the exclusive right to “authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part (...) of fixations of their performances”.

<sup>5</sup> As established in Directive 2006/115/EC

This point is being made not to be unconstructively critical of the existing Terms of Service, but instead to illustrate the importance of performers being satisfactorily provided for in the Europeana Content License and other parts of the project.

### 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?*

AEPO-ARTIS makes no comment with regard to the 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.

However, it does wish to point out that it is not only the institutions that contribute the material which should be given visibility. It is more important that those who have created the material i.e. performers and other rightholders should be credited clearly so that their endeavours are properly recognised. For example, where a performance is available on the site, the names of the performers should be clearly stated.

At international level under the WPPT<sup>6</sup>, performers are granted moral rights, including the right to be identified as the performer of that performance.

Most European Member States have incorporated moral rights for performers in their national law that include a right to be identified as well as a right to oppose any disrespect of integrity in the use made of the performance.

Respecting the right to be identified can serve two purposes. Not only will it ensure that moral rights are properly taken into account, it should also contribute to the database or source of readily accessible information where the performers who contributed to a particular performance can be easily identified.

This will be an important step in preventing future works being categorised as “orphan works”, thus ensuring that performers who are entitled to remuneration, do not suffer merely as a result of an inability of users to identify them. As a general remark, the identity of the performers who contributed to a specific performance should be displayed in whatever means possible e.g. film or television programme credits, CD or DVD sleeves, embedded in audio files such as mp3s etc.

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<sup>6</sup> WIPO Performances and Phonograms Treaty (WPPT) (adopted in Geneva on December 20, 1996) provides in article 5.1: “Independently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.”

#### **Question 4**

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

No comment.

#### **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?*

As stated at question 1, the question of the type of use envisaged is essential.

AEPO-ARTIS sees no need to tighten or slacken the current requirements applicable according to IP law and commercial law.

In particular, should a sound or audiovisual fixation subject to copyright protection be disseminated (reproduced, made viewable on the website, made downloadable...), it would compete with a market of legal offers of music and films proposed by other actors on the market.

Whatever the type of body proposing these activities, the commercial value of the creative work or fixation is the same. As a result, it could directly compete with new commercial interactive services for musical or audiovisual content entering the market.

Generally speaking, clear requirements, to be established by agreement between all stakeholders, should be set out with regard to, *inter alia*,

- Identification of rightholders, including the diligent search criteria to be used to attempt to determine who the rightholders are, prior to any party displaying a performance, and prior to any possible categorising of a performance as being “orphan”;
- Authorisation for use, to be sought by the collective rights management organisations concerned, possibly for a number of repertoires and territories at once;
- The manner in which remuneration for the right-holders is payable (and by whom) prior to the content being made available.

#### **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?*

Any attempt to categorise the various types of content according to their “importance” would be disputable.

In the relatively new world of online use, performers’ rights are too often disregarded and Europeana should set an example – all the more so since it is supported by public

authorities – by ensuring performers receive the protection and remuneration they deserve.

This said, when it comes to making this content available, several possible cases can occur.

If the content is in the public domain, no prior authorization needs to be obtained from the right-holders. This is notwithstanding the fact that moral rights must in any case be respected. May AEPO-ARTIS also recall that a given work may have fallen into the public domain with regards to the author's rights (ex: old theatre piece) but not with regards to the performers' rights (recent performance of a theatre play of this piece).

If the content is not in the public domain, and the use envisaged does not correspond to any of the exceptions to the rights granted by the legal framework for authors' rights and neighbouring rights, the prior authorization of all right-holders concerned is needed. Sometimes, these right-holders can be very numerous and difficult to reach individually. This is a reason why collective management is key in the licensing process.

Performers and performers' collecting societies will cooperate enthusiastically in ensuring the availability of creative content, provided prior authorization is requested and adequate remuneration is generated.

In some limited occurrences, libraries or archives may face difficulties to identify a right-holder of creative content that is not in the public domain or to reach him/her. This may happen notably with older content.

In this case, the potential user should follow in good faith the procedure as described in the memorandum of understanding of May 2008 on diligent search guidelines for orphan works (available on the European Commission's website).

In the event where after such search one or several right-holders cannot be found, the user should turn to the collective rights management societies representing the concerned category of right-holder to obtain the authorisation for use. The licensing society would retain the remuneration owed to the unfound right-holder until he/she can be found; in case of a failure to find the right-holder after a given period as defined in the law or in the national rules, the remuneration will be allocated to support activities in the cultural sector.

Given the fact that each of the books, still images, sound and audiovisual sectors have their own individual characteristics, a sectoral approach in this field seems appropriate.

Finally, in order to facilitate the development and enrichment of digital libraries' catalogues being made available, Member States and their cultural institutions should be encouraged to organise the systematic and complete identification of all right-holders concerned in a given area of creative content. In the digital sector, the task is made easily manageable since information can now be encrypted in the creative content digital format.

This practical measure will have direct positive effects and prevent the occurrence of future orphan works.

It will significantly ease the licensing and the use of copyright protected content.

In view of the above explanations, no mandatory exception seems to be needed, but rather transparency and ad hoc sectoral professional training or dissemination of information concerning the licensing and diligent search procedures.

**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?*

Performers' collecting societies deal with cross-border issues to ensure that performers are remunerated fairly and their rights respected. Cultural institutions in a particular member state should be encouraged to approach their local collecting society for advice on licensing of sound or audiovisual fixations.

**Question 8**

*How can the difference in the level playing field for digitising 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)?*

No comment.

**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 digitised public domain material?*

No comment.

**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?*

No comment.

**Financing and governance**

**Questions 11 to 13 and 15 to 16**

No Comment.

**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)?*

AEPO-ARTIS would only have two comments:

-whatever the business model, it should not detract in any manner from the integrity of the performer or his/her performance;

-should the Europeana project be supported by private investors, with private interests in addition to the general public interest of granting access for all to culture and knowledge in the digital economy, the nature of the project and the effects of such public private partnerships in terms of competition with other commercial services offering cultural creative content to the public should be considered.