

EUROPEANA - NEXT STEPS

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BEUC statement

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INTRODUCTION

BEUC welcomes the adoption of the Communication on Europeana and the commitment of the European Commission to launch a public consultation on concrete measures that would allow Europeana to become a truly European digital library and to make Europe's cultural and scientific heritage available to all on the Internet.

The Communication of the European Commission demonstrates the need for all relevant stakeholders to work together with the aim of optimising the benefits of the new information technologies as regards the preservation and the digital dissemination of European cultural materials. Encouraging the digitisation of literary works and fostering their availability to EU citizens are crucial in enhancing free movement of knowledge.

Europeana has the potential to become the EU response to mass-scale digitisation projects that are currently being undertaken by private entities. Such projects, despite a number of legitimate concerns related to the creation of possible de facto monopoly and the risks to users' privacy, should be seen as **a source of inspiration for the EU with the aim of developing similar services available across the EU.**

CHALLENGES

For Europeana to become a 21st century-style instrument and stand up to the expectations over its launch, a number of challenges need to be addressed. BEUC would like to provide its views on the need to foster access to the information held in cultural establishments, as well as on the problem of orphan works and the risks related the digitisation of public domain works.

- **Availability of content**

Access to the information held in cultural establishments is vital for education, for creativity and for culture. Fostering access to knowledge should be a top priority for the EU in the 21st century as it will benefit all European citizens. All relevant stakeholders should seek sustainable ways to achieve this goal which would enable the EU to become a knowledge-based economy.

BEUC would like to stress that the territoriality of copyright and contractual arrangements by right holders remain the main impediment to the achievement of a truly Digital Single Market, whereby the free circulation of knowledge will become a reality. Current licenses concluded between cultural establishments and right holders cover only a specific territory within the EU. Such a territorial approach entails the risks of consumers being discriminated on the basis of their country of residence. BEUC therefore calls for the European Commission to look carefully into the issue of **multi-territory licensing for all types of content online** and come up with **concrete regulatory proposals** to ensure that equal access to knowledge is granted to all EU citizens.

BEUC agrees with the European Commission's assessment that one of the priority actions regarding Europeana is to include material still in-copyright so as to avoid a "20th century black hole", where very few works is available from the most recent past. Under the existing copyright rules¹, cultural establishments are prevented from taking full advantage of the opportunities offered by digital technologies. There are a number of regulatory restrictions that prevent them from engaging in large-scale digitisation of their materials², as well as legal uncertainty as to the scope of their application³. BEUC believes that a clarification is needed to ensure that **any type of format-shifting and scanning that is necessary for the digital preservation of works should be permitted**. Cultural institutions should be entitled to make the number of copies that are needed for the preservation of its collections to ensure that a work is not lost or damaged.

As regards the communication of literary works to the public, BEUC welcomes the different initiatives undertaken at national level⁴, consisting of licensing agreements between cultural establishments and right holders that allows for the digitisation of cultural material against a fee and their making available to the public. The European Commission should build on these experiences and ensure that a system is put in place that would achieve a fair balance between the right of copyright holders to get fair compensation for the distribution of their works, and the public's right to get access to knowledge.

- **Content in the public domain**

The main question is related to whether digitisation of works in the public domain⁵ in itself creates new rights. It is hard to imagine why the simple fact of format shifting, which is necessary for the preservation of works that are in the public domain, would create new rights.

BEUC strongly believes that the digitisation of works already in the public domain should not give rise to new exclusive rights over the digitised copies. It is important to ensure that the **process of digitisation does not create new copyrights** and that works remain in the public domain after a format shift required for their digital preservation.

¹ 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, OJ L 167, 22.6.2001

² Under the Copyright Directive, cultural institutions (libraries, education institutions, archives and museums) benefit from two exceptions: an exception to the reproduction right for specific acts of reproduction for non-commercial purposes (Article 5.2.c) and a narrowly formulated exception to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (Article. (5.3.n).

³ Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3: under paragraph 3.1. Exceptions for libraries and archives, the European Commission states that the exception of article 5.2.c of the Copyright Directive does not contain clear rules on issues such as "format-shifting" or the number of copies that can be made under this exception.

⁴ This is the case of Netherlands and the Germany as noted by the European Commission in its Communication on Europeana-next steps.

⁵ A work is in the public domain once the term of copyright protection has expired. For example, in the case of books, the copyright term expires 70 years after the death of the author.

We understand the concern that digitisation has costs, but an overall assessment of the costs and benefits of the preservation and dissemination of work is necessary. Material in the public domain is an important source of use/reuse and inspiration, as well as a driver for creativity. It is therefore crucial to ensure that this material will not be locked up.

- **Orphan works**

BEUC believes that one of the priority actions to be undertaken with the aim of foster the availability of content online is the problem of orphan works⁶. The uncertainty as to their legal status acts as an impediment to their digitisation and online availability. In case, a right holder is unknown or difficult to locate, users will be reluctant to make such content available to the public for fear of copyright infringement claims. Consequently, a great number of pre-existing content remains locked and cannot be made available online.

BEUC believes that the adoption of a **regulatory approach** is necessary to ensure legal certainty as to the status of orphan works. Different solutions can be envisaged:

- Introduction of a **statutory exception to copyright legislation** that would allow the reutilisation of orphan works under specific conditions. Such conditions would include the burden of proof that reasonable research to locate the right owner has been carried out, as well as the obligation to reimburse the right owners in case he appears after the use of an orphan work has begun⁷. However, experience with the implementation of copyright exceptions and limitations in Europe reveals a significant degree of divergence from one country to another that results in legal uncertainty. When transposing the Copyright Directive, most States stuck to their national traditions – some allowing multiple and broad limitations, others only relatively few and narrow. For such a solution to be effective, the exception will need to be granted mandatory status and be drafted in a way that leaves no doubt as to the interpretation of its scope.
- **Extended collective licensing.** The system of extended collective licensing has been applied in the Nordic countries and is based on the legal assumption that a license granted by a collecting society covers all right holders, irrespective of whether they are members of the collecting society. A careful assessment of the effectiveness of the application of extended collective licensing for orphan works in necessary. BEUC would like to express its concerns as to a possible conflict of interest that may occur; if collecting societies are given the power to represent orphan works and get a fee for the licences they grant, they might not have an interest in conducting diligent research to locate the author. In case the author is not located, we are concerned that collecting societies would keep the fee.

⁶ Orphan works are copyright work where it is difficult or impossible to contact the copyright holder.

⁷ Stef van Gombel "Unlocking the potential of pre-existing content: How to address the issue of orphan works in Europe?"

- **Licensing by public authorities.** Under this system⁸, a user can request a license for orphan works from a public authority, which will grant it after assessing whether the user has carried out reasonable research to locate the right owner. However, not all EU Member States have the necessary infrastructure and administrative structure to apply such a system.

In addition to regulatory measures, we believe that **practical solutions** should be envisaged to provide more legal certainty. To this end, we support the **creation of a database** providing information as to the legal status of works and allowing for the identification of orphan works. However, in order to ensure the reliability of the information contained in such a database, clear rules need to be established as regards the access to and the management of its contents. In any case, the establishment of databases should only complement legislative solutions that would allow for the reutilisation of orphan works.

The European Commission has recently⁹ announced its intention to examine the problem of orphan works and carry out an impact assessment of the different possible solutions. BEUC welcomes this initiative and would like to reiterate the need for a sustainable solution to be achieved.

END

⁸ A system of licensing by public authorities is already in place in Canada, while similar systems exist in Japan, South Korea and India.

⁹ Communication from the Commission, Copyright in the Knowledge Economy, COM(2009) 532, Brussels 19.10.2009.