



DACS
valuing visual arts

Consultation on Europeana – next steps

European Commission
Directorate General for Information Society and Media
Unit 'access to information', EUFO 2281
Rue Alcide de Gasperi
L-2920 Luxembourg

Email: ec-digital-libraries@ec.europa.eu

I. Introduction

DACS thanks the European Commission for seeking our opinion through this consultation. As representative of a substantial and varied constituency of copyright owners, we wish to participate in what we hope will be a constructive debate. As a licensing body representing the interests of visual creators, DACS is a member of the British Copyright Council (BCC) and we would ask you to note our general agreement with the points raised by the BCC in their response to this consultation. Rather than reiterating these points here, may we take the liberty of referring you to the submission prepared by the BCC on behalf of its members as a complement to the comments submitted below.

About DACS

The Design and Artists Copyright Society (DACCS) is the UK's copyright and collecting society for artists and visual creators.

Established in 1984 as a not-for-profit organisation to promote and protect the copyright and related rights of artists and visual creators, DACS is constituted as a company limited by guarantee under UK law, and is currently governed by a board of non-executive directors comprising representatives from a range of artistic disciplines alongside others drawn from business and the legal profession.

DACS achieves its objectives of promoting and protecting visual creators' intellectual property rights by offering the following services:

Copyright licensing: We act as an agent for our UK and international membership of over 36,000 artists. Our authority for copyright licensing for individuals comes from mandates from creators or their beneficiaries in the UK and via reciprocal agreements with similar visual arts copyright societies (Associated Societies) in 28 countries around the world.

Collective rights management for the entire UK visual repertoire through participation in a range of collective licensing schemes, supported by mandates from fourteen professional associations and trade unions representing 15,000 visual creators, and several thousand

individual visual creators participating in our annual collective licensing distributions. In 2008, DACS paid over £3m for nearly 13,000 claims for a share of collective licensing royalties.

Artist's Resale Right: Our service of collection and distribution of resale royalties which we launched in February 2006 pursuant to UK implementation of Directive 2001/84/EC. Since the introduction of the right DACS has paid over £9 million to more than 1,500 artists.

For further information about DACS, please visit our website: www.dacs.org.uk.

General

Strategic importance of Europeana

DACS welcomes the European Commission's 'Europeana' project and recognises the **strategic importance of providing access for Europe's citizens** to Europe's diverse cultural and scientific heritage.

Cultural Security: Public versus private gatekeepers

Furthermore, DACS recognises the significance for both cultural organisations and visual creators in the European Commission leading the way in protecting the cultural and intellectual assets of Europe, thereby ensuring **long-term cultural security and access** to these assets which is not necessarily the case where major corporations such as Google act as gatekeepers to knowledge. There is no guarantee that Google will not charge for access to these intellectual and cultural assets at some point in the future once it has secured a monopoly of ownership of these assets in digital form.

Recognising the challenges faced by visual creators in the digital age

DACS welcomes the European Commission's acknowledgement of the significance of visual images in the digitisation of archives and collections held by public cultural institutions. We regret that the EU's important ARROW project has failed to include visual images in the scope of its work. However, the Europeana project has the opportunity to set standards of best practice, particularly in **ensuring fair remuneration for creators and their moral right to be acknowledged as creators of these works**.

In-Copyright Content: a 'new deal' for creators

One of the ways in which Europeana could mitigate against the dangers of a 20th century or even 21st century 'black hole' is to create a **pan-European fund to compensate creators** and rights holders for use of their content. This would have the additional benefit of ensuring that resources were re-distributed to content creators thereby fuelling the creation of new creative and intellectual assets for Europe.

Finding effective licensing solutions

In addition, organisations like DACS are developing **new digital licences for the museums sector and the higher education sector in the UK** which draw not only on our own repertoire but also on the repertoire of our sister societies across Europe with whom we have reciprocal agreements.

Governments often ask the players in the market to resolve complex licensing issues in order to provide solutions to desired public policy outcomes (such as this). However, licensing bodies in some cases are subject to national jurisdictions which create civil and criminal offences with wide-reaching consequences for all parties where ideally a licensing organisation would provide (and is sometimes under pressure to offer) a collective solution which enables third parties to use works by non-members or unknown rightsholders.

We suggest in the context of Europeana, inter alia, that the Scandinavian model of extended collective licensing is a successfully established model which provides for a licensing framework giving legal certainty to users and elimination of risk arising from civil and criminal claims for licensing bodies. Given the nature of the subject matter within Europeana and the associated rights issues (including so-called orphan works), we suggest this model is worthy of more exploration as a potential route to desired public policy outcomes.

II. Consultation Questions

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?

As part of a network of sister societies DACS has already very successfully embraced multi-territorial licensing models. We also believe that copyright as a territorial right should be strengthened in particular in the light of preserving and promoting Europe's cultural diversity.

However, we would welcome further information and education of consumers and other stakeholders (for example ISPs) that Community copyright regulation has only been partial and that rights in general have to be obtained for each Member State in which the content should be or has been made available; and resulting from this that individual Member States' copyright laws have to be respected when licensing on a multi-territorial basis. We do not believe that the concept of multi-territorial rights licensing should be abused to create safe-harbours within the Community, but on the contrary that the cultural diversity within Europe should be maintained and respected, which we believe to be one of the main objectives of Europeana.

We would also like to emphasise that multi-territorial licensing within the Community does take place and that the example in the European Commission's Communication 'Europeana – next steps' dated 28 August 2009 of a French aggregator being forced to withdraw photographs from Europeana is a rare and not very suitable example. As outlined above DACS for example operates as part of a network of associated societies through reciprocal representation. The network is in a position to operate on a multi-territorial licensing basis which is regularly the case when licensing online reproductions. It is therefore a question of rights clearance and specifying the scope of rights needed; in this respect financial considerations or related legal issues could be overcome by operating a system like the mentioned Gallica2 partnership rather than making additional reproductions directly available through Europeana.

We would further like to highlight an important factor with regards to visual arts and the fair and equitable remuneration of visual creators when using their works. Unlike literary works, where authors regularly receive additional remuneration for the translation of their works in other European languages, visual art has no need for this type of adaptation to make it accessible to all citizens of the European Union. This means that visual creators in particular have to rely on fair and equitable remuneration for the use of their work in projects like Europeana.

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)?

We do not believe that the introduction of a cut-off date similar to the US would be a viable option in the consideration of how to address the difference in the level playing field for digitising and making accessible older works between the US and Europe. European copyright law has a long standing tradition of linking the duration of copyright to the lifetime of the author of the work whilst this was not always the case under US law. The application of fixed terms under US law therefore automatically led to the phenomenon of a 'cut-off' date which cannot set a precedent for the measures employed by the European Commission to encourage full scale digitisation. On the contrary, DACS believes that digitisation of in-copyright works on the one hand and public access to works are not in conflict and any solution to achieve the envisaged digitisation of works should therefore take full account of the duration of copyright in Europe.

DACS appreciates that the question of the duration of copyright is particularly problematic with regards to orphan works in particular where the author of the work is unknown as this will make the determination of the expiry date of copyright difficult, if not impossible.

However, DACS believes that national laws have proved flexible and are adapting to technological developments, either through amendments to the laws or through the adoption of licensing schemes that adequately address the concerns raised by the Commission. For example, DACS is developing a new digital licence for the museums sector in the UK that will enable mass digitisation of the complete copyright protected repertoire owned by public museums for certain non-commercial uses. This extended collective licence will include copyright protected members and non-members and will therefore also cover orphan works, ensuring an adequate and equitable remuneration for visual creators for the digitisation and communication of their works by public museums. This licence will therefore not only overcome any potential 20th century black hole as outlined in the Commission's communication 'Europeana – next steps' but will also provide the necessary certainty and encourage museums to digitise and communicate orphan works while keeping the costs to these public bodies at a minimum.

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?

DACS does not believe that any policies should be adopted which seek to the creation of new types of sui generis copyright as this would distort the way copyright operates on a more general level. As outlined in the European Commission's Communication dated 28 August 2009, this would not normally be the case, but is likely to occur in particular with regards to photographs. Although the originality criteria for photographs has been harmonised through Article 6 of Directive 93/98/EEC, the same article allows Member States to provide for protection of other photographs than those fulfilling the originality criteria. To therefore exclude copyright works that maybe created through the digitisation process could have implications on works that are created in a similar way and would otherwise attract protection.

We further do not believe that access to public domain works necessarily has to be for free in the digital environment as this is not the case in the analogue world. Just because a work is not copyright protected any longer does not therefore automatically mean that the work is available for free and we do not believe that this should necessarily be the case because the work was converted into a digital format. Europeana should enable access to works to ensure that Europe's diverse culture is preserved and that Europe's citizens have access to their cultural heritage, but this does not necessarily have to be for free.

DACS understands the Commission's criticism that public institutions may use public money for the digitisation of their collections and subsequently lock up this content rather than turning it into a pervasive asset for the information society. However, we believe this to be a contractual

issue if these public bodies use public grants for digitising their collections and it should therefore be a matter of contractual stipulations when making the grant that the works digitised have to be made accessible in a certain way.

In this respect it is also important to bear in mind that the possible copyright subsisting in the digital reproduction of works and objects will not always vest in the public body but may lie with the creator of the digital copy commissioned by the public body. Exempting these digital copies of works from copyright would therefore unjustifiably prejudice the interests and rights of these creators and **would result in visual creators effectively 'subsidising' public institutions** by not being compensated for the commercial exploitation of their work.

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?

DACS does not believe that there should be minimum requirements for the way in which digitised content is made available through Europeana. It is DACS' understanding that the primary European objective is to make Europe's cultural and scientific heritage accessible on the internet. As described in the Commission's communication dated 28 August 2009 this access can take various shapes and forms and can be facilitated through hyperlinks from Europeana to the participating cultural institutions or other third parties. We believe that this satisfies the criteria of making works accessible and any additional stipulations would constitute an unjust burden in administering the constantly growing body of works and public domain content.

We would be happy to supply further comments or information about this submission upon request.

Contact

Christian Zimmermann
Legal & Business Affairs Manager

Design & Artists Copyright Society
33 Great Sutton Street
LONDON
EC1V 0DX
T: +44 (0)20 7553 9066
christian.zimmermann@dacs.org.uk

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