



European Digital Rights

Response to Europeana Consultation

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?

The importance of content that has been collected should ideally not be judged by Europeana. Legal deposit libraries should be collecting the whole corpus of available works; and to the extent and form that these are made available on the web, they should be included within Europeana. Other institutions such as museums are already applying a filter on works, by choosing to collect them, and are perhaps best placed to judge what is relevant. They will be likely to filter for 'cultural value' which may be prejudicial to the collection of low or 'popular' culture. We do not see any reason to apply a further filter. All cultural outputs may be of interest.

Web archives pose a particularly interesting case, as they may give the greatest insights to popular opinion, interest and activity. Special attention should therefore be paid to making this content accessible via Europeana.

The real test to 'availability' may be the ability to search and find relevant material. The underlying categorisation and search facilities will therefore be key to making content accessible in practice.

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?

We believe a single pan-European mandatory exception, that cannot be waived by contract, would create the greatest legal certainty for use of orphan works for cultural research purposes. This would clearly define what organizations and individuals can and cannot do within copyright law.

The Commission has other roles to play as well. The Commission can lead a discussion of historical cut-off points that would allow orphan works to be used without fear of prosecution. The Commission can also encourage the use and creation of pan-European standard licenses. The Commission also has a role to play in the promotion and use of rights databases such as Arrow.

For commercially available works, European states need to ensure that funding is available so that rights holders can be paid.

Copyright terms, which are still slightly different across Europe, are also too long. Simplification and reductions in copyright term would ease the problems of usage of older content, while being very unlikely to cause any damage to the incentive to create new cultural works.



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)?

The Commission can facilitate discussions to create cut off points such as those in the USA. The Commission can put pressure to create and conclude a debate on cut off points that others cannot.

We agree that databases of works, including works identified as orphan, are good pragmatic steps towards making digitisation easier, and that lower requirements for searches for rights holders are appropriate as a work increases in age. As rights are inherited, they are often shared between descendants and also forgotten, so the complexity of locating rights holders can increase dramatically with time.

The underlying problem is unduly long copyright terms, however. The copyright system is at present designed to work for a small class of high profile commercial works, but the rules by default cover all creative material produced.

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?

The EU should consider abolishing the sui generis database right. The main regulator of electronic information is contract, which has proved a more than adequate means of protecting data in non-European jurisdictions. It remains an anomaly with international law that we would do well to abolish.

The sui generis database right also contains imbalanced exceptions that do not account for full range of the public interest.

The alternative will be to attempt to remove sui generis database rights through licence agreements. We are in a position to give detailed comment, but would assert that this is a complication repeated elsewhere that everyone could do without.

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?

The biggest problem with digitisation of public domain works seems to be funding. Without funding, two pressures emerge which lead to the 'privatisation' of public domain material. In order



to recoup costs, institutions seek either to make profit from the newly digitised works, or to enter into license agreements in return for digitisation by third-parties. In both cases, the costs are recouped by placing the newly digitised material outside of the public domain.

In our view, out of copyright work should remain out of copyright, including when digitised. It should stay in the public domain. This presents the best opportunity for the widest possible benefits from digitisation. Whether reuses or derivative works are anticipated, these are far more likely if digitised works are kept in the public domain.

There is a case for developing an informal 'social contract' to respect cultural sensitivities and moral rights, but we should not expect rigid enforcement of terms, rather we should encourage social responsibility.

Standards for digitised works should include data, formats, meta data and file qualities such as resolution and sample rates.

The benefits of reuse can depend on quality of the available digitised work. Archive.org in the USA has helped commercial creators reuse public domain advertisements and information shorts; but without reasonable quality, commercial reuse would not be possible.

Financing and governance

Questions 11-16

These questions are not of primary concern to EDRI, but we wish to observe that public-private arrangements in digitisation can lead to unwarranted and un-beneficial privatisation of public domain content.

Private companies will inevitably include technological partners providing for instance search technologies,

We observe that there has been an expanded role of collection and curation in cultural sector but funding has not expanded to cover the new digital commitments. The result has been piecemeal coverage of digitisation, collection and curation.