



EGEDA's Answers to the Consultation launched by the European Commission in the framework of its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Europeana – Next Steps

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This response is formulated by the Audiovisual Producers' Rights Management Association (EGEDA).

EGEDA was set up in 1990 to represent and defend the interests of audiovisual producers in Spain and Latin America and manage their copyright and neighbouring rights.

EGEDA would like to thank the European Commission for launching this public consultation on the next steps of Europeana.

## **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?

### **Answer**

EGEDA welcomes the initiative of Europeana and is in favour of giving access to cultural content through online platforms. A good example of online distribution platform of legal content is Filmotech, set up by EGEDA in 2006.<sup>1</sup>

Filmotech is a platform which has been developed to both reply a demand of legitimate content and enable the access to the market by independent producers or other rights holders who do not have the resources required to it, whose productions cannot be considered as premium or that simply do not have the access to the platforms.

Filmotech contains more than 1.330 digitized films and has concluded more than 270 contracts with producers in order to distribute their contents in filmotech.com. Producers are offered 65% of the net revenues generated by the licences granted on their works which is higher than the usual share in the distribution market (in the area of 25 to 35% of the final price to consumer). The platform offers a streaming on-real platform easy to use. Users are thus enabled to view the film in any computer and with any navigator. The normal price of a film is € 1, 74 without prejudice that new films be licensed to the price chosen by the right holder.

Europeana makes available works which have fallen in the public domain whereas with regard to materials protected by intellectual property rights (IP protected material) Europeana includes by now links to websites where users can view such content according to the terms of use.

EGEDA considers that before exploiting any work in Europeana it is essential that the status of the work be verified. It must be taken into account that several authors can hold rights on the same work. It will therefore be necessary to verify if all co-authors are dead and if the term of protection of intellectual property rights has or not expired. In this context, collective

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<sup>1</sup> [www.filmotech.com](http://www.filmotech.com)

management organizations play a vital role in the provision of information on the status of the work. EGEDA for instance, holds a registry of the names of audiovisual producers and the audiovisual works and material on which they hold rights. This registry has been recognized by the Spanish Institute for Cinematography and Audiovisual Arts (ICAA) of the Ministry of Culture.

EGEDA considers that the way Europeana is evolving by now as far as IP protected materials are concerned strikes a balance between users and rights holders.

However if Europeana wants to make IP protected materials available directly through its website, EGEDA believes that a system seeking rights holders' prior authorizations should be established. The system should also deal with the remuneration to the benefit of rights holders and the terms of use to be respected by users.

Besides, if Europeana includes in the future metadata of IP protected materials, rights holders will have to be involved in the process of creation and transformation of metadata. Metadata will be available in Europeana for non commercial purposes. The previews of IP protected materials will have to be agreed with rights holders and indicate the source and the name of the author.

## **Content for Europeana**

### **Question 7**

What is the best way to encourage cultural institutions and right holders 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?

### **Answer**

EGEDA thinks that to enable cross-border access of IP protected materials two conditions must be fulfilled: an appropriate legal environment and long term available financing.

#### 1. An appropriate legal environment

A legal major drawback for EU content industries is the non application of the liability system when telecom operators carry out activities of mere conduit, catching and hosting of IP protected materials even in the case that the relevant rights holder has made aware the operator of an infraction of its exclusive rights. Telecom operators have been thus placed in a legal situation where they are running a business one of whose drivers is the illegal download of IP protected materials, but have no obligation to stop it.

Under these circumstances, a reform of the liability system enshrined in the E-Commerce Directive (articles 12 and 14 especially) is required.<sup>2</sup> The effective knowledge of an illegal act communicated by the damaged party has to be considered effective notice of the illegal act.

## 2. Long term available financing

One of the key problems of the European content industries is the lack of financing adapted to the cycles of the markets. The business model of most European cultural industries is made possible based on a commercial financing which is available in shorter terms than the recoupment terms as in the digital world. State financing does not exist anymore, and it prevents the operators to develop the availability of the existing assets to the digital world and to develop new ones for that market. In that field the European Investment Bank could be the provider of the medium and long term financing which is required.

### **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)?

### **Answer**

In the orphan works area, EGEDA believes that libraries and archives should make an estimate of real orphan works, as there may be cases where not enough diligence has been employed. In not so few occasions the mention that the editor has been unable to locate the successors of an author really undercovers a lack of diligence. The role of collective management organizations in the identification of the status of the work is essential. For instance, EGEDA holds a registry of the names of audiovisual producers and the audiovisual works and material on which they hold rights. This registry has been recognized by the Spanish Institute for Cinematography and Audiovisual Arts (ICAA) of the Ministry of Culture.

EGEDA is also in favour of a licence to be granted by the collective management organizations which shall be depository for the collected funds for the maximum term of the applicable statute of limitation. The final destination of the time barred funds should be object of a separated treatment. According to EGEDA's experience there are not some many feature films in this situation, although there may be documentaries, short subjects and the like; the case of the news reels is to be treated apart, as there are doubts to which extent they may be considered as works or simple recordings.

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<sup>2</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178 , 17.07.2000, p. 1-16.

Another tool could be the set up of databases of orphan works. In this sense the ARROW project is a good initiative which could, if necessary, be extended to other content sectors.

On the contrary, EGEDA is not in favour of a mandatory copyright exception with regard to orphan works. It defends that rights holders and users should find licensing models to exploit these works.

#### **Question 11**

Which financing model would reflect a fair distribution between Community funding, Member States' funding and private funding, taking into account that the aim of Europeana is to give the widest possible access to Europe's cultural heritage at pan-European level? Could Europeana be financed solely by national cultural institutions or by private funding?

#### **Answer**

EGEDA thinks that the European Community should fund the development of Europeana, through programmes such as the ICT Policy Support Programme or the 7<sup>th</sup> Framework Programme of Research and Technological Development.

#### **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 rights holders where the user can buy in-copyright content, or through another type of partnership)?

#### **Answer**

EGEDA defends that the private involvement in Europeana should be organised through the inclusion of links to websites where IP protected material is available. This system allows users to have access to protected material provided the terms of use are respected and guarantees that rights holders see their rights remunerated and respected.

On the industry side, it will encourage the cultural and the techno industrial sector to partner in developing new areas of collaboration that enable to widen the offer to end users and consumers.

A different issue which is directly linked to IP protected materials is the inclusion in Europeana or creation by Europeana of metadata on such materials. In the framework of the conference "Creation, Collaboration & Copyright" organised by Europeana in September in The Hague it was advanced that at a first stage Europeana would contain metadata and previews of IP protected materials. With regard to metadata, EGEDA advocates the collaboration between rights holders and Europeana in the creation and transformation of metadata on their IP protected material that will be made available for non-commercial use in Europeana. The

previews of IP protected materials will have to be agreed with rights holders and indicate the source and the name of the author.

**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 sponsors, promotion of specific products)?

**Answer**

According to EGEDA private sponsorship could best be stimulated through the insertion of the logos and the promotion of products of rights holders.

**Question 16**

Should there be a contribution (financial or other) in exchange for the links from Europeana to sites with content for which the user has to pay? Can a model such as that of Gallica 2, providing links from the site of the Bibliothèque Nationale de France to the content on the sites of French publishers, be transposed to Europeana?

**Answer**

EGEDA is not in favour of rights holders charging for the inclusion in Europeana of links to their websites where their IP protected material is available in exchange for a fee and upon prior authorisation.

A different matter would be that Europeana includes as such the IP protected materials in its website. EGEDA would then require a system to ask rights holders' prior authorization, to remunerate them for the exploitation of their works and to make users respect the terms of use of the work.