

13th November 2009

FEP response to the European Commission consultation on “Europeana next steps”

The Federation of European Publishers (FEP) is the association representing national book and learned journal publishers' associations from 26 European Union Member States and European Economic Area. Thus FEP is the voice of the great majority of publishers in Europe. Founded in 1967, FEP deals with European legislation and advises publishers' associations on copyright and other legislative issues.

FEP welcomes the possibility to contribute to the European Commission call for comments to the Communication on “Europeana-next steps” and we look forward to a fruitful debate in order to continue to work together to provide the best possible access to works for European readers through Europeana.

Questions on General issues (Question 1-5)

The future of Europeana as a common access point to Europe's cultural heritage in the digital environment should continue to be based on **respect of IPR, open standards, market neutral solutions and working in collaboration with all stakeholders.**

FEP has always been supportive of the Europeana initiative which underlines that “since intellectual property rights are a key tool to stimulate creativity, Europe's cultural material should be digitised, made available and preserved in full respect of copyright and related rights”¹. European copyright laws have allowed the development of a highly successful publishing industry, consisting of many SMEs, worth more than 24 billion euros and publishing 500.000 new books on a yearly basis, thus contributing remarkably to European cultural diversity.

European publishers also support the essential principle of Europeana that all solutions should be based on open standards and must be market neutral so as to avoid the creation of de-facto monopolies. The question of striking a balance in Europeana 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 does not seem highly relevant, as the priority should be to provide access to digitized documents through as many channels as possible. One way to increase access could be for the Commission to encourage the development of a competitive web technology industry.

The inclusion of “minimum requirements for the content brought into Europeana” (Question 5) may imply limitation to business neutrality of Europeana, and also inhibit innovation as far as pre-defined usage terms may prevent new models to be launched.

¹ Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation.

Finally Europeana, by working in partnership and constant dialogue with all stakeholders, secures the integrity of works and high quality of authenticated digitisation.

This way, European consumers can choose freely from the full, diverse range of works digitised with full respect for author's moral rights.

Questions on Content for Europeana (Question 6-10)

Cultural institutions should be encouraged to facilitate access to in copyright works through Europeana by providing links to publishers' websites and e-aggregators. This public-private partnership is the model that is being successfully deployed in France by the Bibliothèque Nationale de France and French publishers with Gallica. This system allows access to in copyright works through a plurality of business models which permit a tailor made approach to consumer demands². The Biblioteca Nacional de España (BNE) and the Federación de Gremios de Editores de España (FGEE) have also been working since the end of 2008 on a common project to facilitate the inclusion of copyright protected books in digital libraries. Similarly, the Italian national libraries and the Italian publishers association (AIE) jointly submitted for funding to Italian authorities a joint project based on the same principles.

In order to **facilitate accessibility of works**, the **High Level Group on Digital Libraries**³ chaired by the European Commission developed a series of tools to deal with issues such as orphan or out of print works. These were agreed by representatives from cultural institutions and rightholders and include a MoU on orphan works, sector specific guidelines on diligent search for orphan works and two model licenses to facilitate access to out of print works. The decisive criterion that underpins the agreement achieved in this group is the need to conduct a diligent search in the country of publication prior to the making available of the work. Such instruments should be the basis of any discussions and these tools should be exploited and fostered by Europeana to make works available.

One of the points stressed in the MoU on orphan works was the need for further development of mechanisms to facilitate the use of these works. As a follow up to set up such mechanisms, a consortium of European national libraries, publishers and reproduction rights organisations (RROs) including authors are currently participating in **Arrow**⁴ (**Accessible Registries Rights Information and Orphan Works towards Europeana**). This project, which is supported by the European Commission within the eContentplus programme, was launched in November 2008 with an initial duration of 30 months. Arrow will facilitate the best information available in a predefined set of sources, to determine the right status of any book. A rights information infrastructure will be set up to facilitate the challenges on orphan works, out of print, clearance of protected material, and interoperability between private and public collections moving towards a more inclusive European digital library.

² For more details on Gallica and its collaboration with French publishers see answer to the consultation from the Syndicate Nationale de l'Edition.

³ http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/index_en.htm

⁴ www.arrow-net.eu

When envisaging ways to encourage content to be available through Europeana, it is relevant to clarify that **the issue at stake is not “mass digitisation” but “mass making available online”**. According to Article 5(2)c of the Directive 2001/29 public libraries, educational establishments, museums and archives benefit from an exception that allows them to make specific acts of reproductions which are not for direct or indirect economic advantage. Furthermore, by virtue of Article 5(3)n, the same establishments can make works available for the purpose of research or private study to individual members of the public by dedicated terminals on the premises of the establishments.

Therefore, libraries already benefit from an exception to make certain acts of digitisation of works and make them available within their premises for certain purposes. However, it is paramount that digitising works beyond such authorized uses and making them available online must be done on the basis of voluntary licensing agreements with rightholders. Otherwise this could lead to a situation where libraries would be competing illegally with rightholders and damaging commercial exploitation of the works.

Concerning **orphan works**, despite the fact that the number of orphan works in the book sector is not very significant, any initiative to address this issue must be based on **due diligent search in the country of publication before making works available**. For the purpose of facilitating identification of the status of the work librarians, authors, publishers and their RROs are all collaborating in the Arrow project. However with the shift towards electronic reading it is crucial that mass digitization and making available of books by cultural institutions and other users is limited to works that are identified as orphan. In case of other copyright protected works, rightholders are incentivised to invest in making those works available at their own expense because they may make a financial return on the investment made.

We understand that the European Commission is undertaking considerable efforts to carry out an impact assessment on orphan works to examine the need to ensure legal certainty when orphan works are digitised and made available. In our view, the most pragmatic approach is the one already recommended by the HLG which builds on the **idea of mechanisms in each Member State having a minimum common denominator and mutual recognition of national solutions**. In particular, one of the possible approaches presented by the Commission in its “Communication on copyright in the knowledge economy”⁵ is to provide **guidance on cross-border mutual recognition of orphan works**. We consider this is in line with what has been recommended by the HLG and it will allow each Member State to develop the most appropriate solution in accordance with their legal tradition minimising red tape and unnecessary legislative burden. Member States have already started taking different approaches to address the issue of legal certainty for orphan works.

Some examples can be seen, inter alia, in countries such as France, Hungary or the UK. In France legislative changes are proposed in order to establish a compulsory collective management system for orphan works in the written and visual sector⁶.

⁵ Communication on Copyright in the Knowledge Economy:
http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20091019_532_en.pdf

⁶ Recommendation from the Conseil Supérieur de la Propriété Littéraire et Artistique on orphan works, 10th April 2008:
<http://www.cspla.culture.gouv.fr/CONTENU/avisoo08.pdf>

Also in Hungary there is a new regulation on orphan works introduced in May 2009 providing that after a diligent search users can obtain licenses for orphan works given by the Hungarian Patent Office. The main features of this system are that there will be a diligent search, payment of a fee and involvement of the Patent Office.

In the UK, discussions between the government, publishers and other stakeholders relating to orphan works have been under way for some time, following the Gowers Report in 2006 and the more recent Digital Britain Report. One problem is that there is currently no mechanism under UK copyright law to legitimise the granting of orphan works licences, even to applicants in good faith who have completed due diligence searches. It is likely, however, that new legal provisions will be included in the forthcoming Digital Economy Bill (due to be introduced into the UK Parliament in a few weeks time), which will permit the relevant Minister to authorise orphan works licences, and regulate appropriate licensing bodies. It is also likely that the UK will adopt for the first time provisions permitting Extended Collective Licensing, which will make orphan works licensing even more viable. The intention primarily will be to authorise the granting of licences by established collective licensing organisations, who will have the experience and facilities (and much of the available rights data) to administer such licences in the interests of all relevant rightsholders, and distribute any remuneration which may be required

In case of **out of print works**, it is important to note that rightsholders agree to support voluntary licensing after prior authorisation of the rights holder for the digitisation and the making available of the works by a cultural institution. Some works might be out of print in one edition (e.g. hardback) and in print in a second edition (e.g. paperbacks), some others might be updated (e.g. dictionaries) or simply the author might not want to the making available of his/her book and in this case moral right must be respected.

The Commission Communication on “Europeana next steps” refers to a situation in the United States where works published before 1923 would fall in the public domain. This **1923 cut off date** is the consequence of the implementation of the Berne Convention for the Protection of Literary and Artistic Works in the United States⁷ after several complicated changes affecting extension of the term of protection in the mentioned country⁸. However according to US case law, this 1923 cut off date does not apply to foreign works in the US⁹. **Moreover, in Europe a cut off date for orphan works is neither relevant as orphan works are not works in the public domain nor desirable.** This is supported by the MoU on orphan works signed by rightholders and cultural institutions which concluded that “historic cut-off dates were not thought to be helpful”¹⁰.

⁷ Article 7(1) of the Berne Convention :*The term of protection granted by this Convention shall be the life of the author and fifty years after his death*

⁸ For more information on US Copyright and term of protection see: <http://www.copyright.gov/>

⁹ TWIN books v Disney

¹⁰ Memorandum of Understanding on Diligent Search Guidelines for Orphan Works, Report from the visual/photography working group.

We firmly believe that **voluntary agreements between rightholders and cultural institutions is a more pragmatic and helpful approach to encourage digitisation and the making available of works**. A good example is the agreement within the Digi©E Committee (Digitisation of Cultural Heritage) reached in The Netherlands between the organisations representing the libraries (FOBID) and the rightholders (VOI©E). Under the agreement, Dutch libraries, archives or museums can register their digitisation projects in a Registration Centre that has been set up by the rightholders associations and currently there is an ongoing project to digitise and make available newspapers before 1995. Another example is Bokhylla.no ('Bookshelf') in Norway. During May 2009, Kopinor (the Norwegian Reproduction Rights Organisation) and the National Library of Norway signed an agreement regarding this pilot project for digital books on the Internet. Under this project the library will make all Norwegian books from the 1790s, 1890s and 1990s available on the Internet. All titles from the 1990s and some titles from the 1890s – together approx. 50.000 books – are under copyright. These books will not be prepared for print or download, but will be made available to Norwegian IP-addresses. The licensing agreement will be supported by the ECL and rightholders will be able to opt out of the agreement if they wish so. Both examples have been carried out on a voluntary basis and following negotiations with rightholders.

Questions on *Financing and governance* (Questions 11-16)

With regard to the financing model of Europeana, we would suggest as a balanced approach a **mixed system with public contributions and private-public partnerships (PPP)**, as recommended by the 2006 Commission Recommendation on digital libraries. PPP should be encouraged both at national and EU level by supporting copyright as an enhancing tool.

To this respect, initiatives that see publishers engaged with libraries in PPP offering newly published and backlist books to be consulted through Europeana - some examples are Gallica in France, Enclave in Spain or Libreka in Germany (see below) -, while not contributing directly to the financing of Europeana, nevertheless have an economic impact since they offer Europeana a virtually inexpensive way of including in-copyright material in its collections.

Public policies for digitisation activities of libraries in Europe should be defined in order to clarify the objective and means available for Europeana. A good starting point is the report on public private partnerships adopted by the HLG which includes indications as to how to promote and make use of PPP cooperation and private sponsorship for the digitisation of Europe's cultural heritage. Some key points to be considered are:

- **Ensure high quality digitisation and selection of works**

In order to avoid duplication and poor digital collections and increase efficiency, it is paramount that European digitisation activities are guided by principles of high quality, selection and presentation of content in an organised way, on the basis of libraries' expertise. It is not feasible or realistic to digitise every work at random within library holdings. Priority should be given to public domain works and then gradually extend to orphan works. It is important to support efforts of rationalisation to avoid duplication of digitisation of public domain books by libraries.

This could be done, for example, by setting up registries where libraries indicate which books they intend to digitise so other libraries could digitise other books and they could share the digitised copy or add the names of their institutions to it.

In case of in-copyright works a license must be obtained to give access to such books or other possibilities like Gallica or Libreka should be explored. Generally books in a given language don't have territorial restrictions attached to their licensing, so if a library wants to digitise and make online available books still under copyright under a PPP, these can ask for a single EU license.

- **Provide incentives for the private sector to engage in Europeana.**

Europeana and European libraries in general would also benefit considerably from **an increased plurality of private entities engaging** both in digitisation efforts of public domain works or PPP with rightholders for in copyright books (both by establishing new ones and connecting to existing ones). An optimal way to achieve private involvement would be through links from Europeana to the sites of publishers and other rightholders where the user can buy in-copyright content, directly or through successful projects already undertaken in the same field in various European countries, such as Gallica, Enclave and Libreka.

The Gallica project is the result of a public-private partnership between the French National Library (BnF) and the French Publishers Association (SNE), an interesting model for the coexistence of public and private offers.

In March 2008, Gallica 2, the new version of the digital library of the BnF, started displaying contemporary works under copyright alongside its digital public domain collections. The online access from a single entry point to public domain works, consultable entirely, and to contemporary works, which can be browsed for extracts in full respect of copyright, constituted a world premiere.

One year earlier, the French Ministry of Culture created a new committee in the National Book Centre (CNL) in charge of digitisation policies in order to determine the modalities of financial aid to digital publishing projects.

The CNL is the public body in charge of financing policies in support of the book industry; financing from CNL prompted the BnF to start mass digitisation of its public domain collections. In October 2007, the beta version of Gallica 2 was launched, and in December the conditions for participation were announced. Gallica 2 then became the French contributor to Europeana. In March 2008, the experiment started with over 3000 copyrighted works. By March 2009, the merge between Gallica offering full access to public domain contents and Gallica 2 was completed and the project was again renamed, Gallica. This system now offers access to 16.157 in copyright books, via different business models.

Respect for copyright and fair remuneration of rightholders are founding principles of the Gallica experiment. Other key points are:

- all publishers can make their works available as long as authors have ceded them the rights for digital exploitation;
- e-distributors (included the publishers themselves) will act as intermediaries between publishers (who choose them) and the BnF (who approves them); the BnF is authorised to harvest the distributors' metadata and text files for indexation;
- research of books on Gallica is made on the collections of public domain and copyrighted works, relying on metadata and full text search;
- browsing of extracts of copyrighted books is done on the e-distributors' sites, according to the publishers' indications;
- it is possible to purchase the displayed works, starting from an e-distributor site, by downloading them or subscribing to a "digital library" directly from there or after redirection to an associated bookseller's site or even a library site which may have subscribed a license to a "digital library"; the BnF and its public partners do not play any commercial role and do not receive any remuneration from the sales.

The business model applied to Gallica is therefore that of the digital library for the public domain works, and of the digital bookstore for copyrighted works (for which case the digital library model was deemed technically and economically unrealistic); the latter relies on individual paid access to works according to the terms defined by publishers or access via libraries which have bought licenses, thus reproducing the model of selling printed books. It therefore allows readers to access books via very different ways, thus allowing competition and cultural diversity.

Publishers and e-distributors are eligible as beneficiaries of the funds for digitisation and diffusion of copyrighted works of the CNL. They need to match two general criteria: respecting the indications of the documental charter of copyrighted works established by BnF and SNE, and holding explicitly the rights for digital exploitation. In exchange, they commit themselves to participate in the experimentation for at least one year; the commitment is not exclusive.

On very similar grounds, a **PPP between the Spanish National Library (BNE) and the FGEE (Spanish Publishers Association) is initiating a project called ENCLAVE Editores-BNE**. The project, first called ODIBNE-Pro (Protected Digital Offer in the Spanish National Library), is a joint initiative of the BNE and the FGEE whose objective is to set up a Centre for the analysis, definition, development and dissemination of models of integration and exploitation of copyrighted digital contents in digital library environments.

The idea stems from the lack of a model to establish the terms under which such a service could be provided, which prevents libraries from offering some form of access to copyrighted works. In its first phase, the project's pilot objective will be to integrate copyrighted digital works in the Spanish Digital Library (BDH) inaugurated in January 2008 by the BNE. This will be a guide for the future actions of the Centre and a test bed for progresses in every stage of the project.

According to the model chosen, the BDH will have at disposal the necessary information to allow its users performing full text search of copyrighted books and to provide complete bibliographic data and additional features such as cover images, summaries, indexes and samples of the works' content.

From search results in the BDH, users will have the opportunity to be redirected to an e-distribution platform (an aggregator's/distributor's site), in order to further browse the book, have access to full text, download the book, etc., according to the specific business models and commercial conditions established by publishers. Works in the public domain will be accessible for free directly on the BDH website.

The BNE has fixed some criteria for the selection of copyrighted works to be included in the project. Publishers providing e-books will have to prove their ownership of the corresponding digital rights. Only digital versions of existing printed works will be considered; full text display or download shall be provided, under the technical and commercial conditions established by publishers. Publishers will keep e-distribution platforms operative all along the duration of the project and will provide the necessary information and files to the relevant actors of the project.

Publishers will select the books they intend to integrate in the project and will sign the subsequent agreements with the BNE and FGEE. Publishers will then produce the necessary files, metadata and rich catalogue data. DILVE, the Spanish internet platform that manages bibliographic and commercial information for book sector professionals, will take charge of the metadata handling.

At the end of 2008, the BNE undertook a massive digitisation programme, sponsored by the telecom company Telefónica, which should lead to adding some 200,000 more public domain works in the next 5 years. The BNE/BDH is also a contributor to Europeana and ENCLAVE shall explore ways to include copyrighted works in the services offered by the European Digital Library.

The project has received subventions from the Spanish Ministry of Industry, Tourism and Trade in the framework of the Avanza Content Sub-programme, part of a broader government initiative aimed at fostering innovation and the adoption of information technologies by enterprises. Part of these subventions will be given to publishers to cover the costs of digitisation.

Libreka! is a large aggregator/distributor of electronic books. The project is the result of a **collective private initiative of all the German publishers and booksellers members of the German Publishers and Booksellers Association (Börsenverein des Deutschen Buchhandels).**

Operational since 2007; at the beginning it was a full-text search platform to which publishers uploaded PDF files of their works with all the words indexed as metadata. The service, open freely to the general public, did not allow copying, downloading or printing, but permitted searching the digital books in their entirety according to metadata and keywords.

Participation in the platform was initially slow, with some 4,000 titles uploaded at the start; now, however, some 110,000 titles are available for searching on Libreka!, from 1,230 different publishers.

The project is connected to the German books-in-print database, the VLB; it is funded by the contributions that publishers in Germany pay have their titles listed in the VLB. Since bibliographic searches only are not deemed as to give enough information, there is a plan to integrate full-text search among the options available for all the books in the in-print database.

All of the functionalities of the VLB are therefore being merged into Libreka; there are some 1.5 million titles on VLB, which are migrating now. In addition, in March 2009 Libreka! also started allowing selling e-books through its platform; finally, in a near future the platform will start providing content to Europeana, following different mechanisms but based on the same principles as the previous examples.

Europeana is already taking advantage of the model set up by Gallica and will soon by the other two experiences illustrated. In addition, it could draw inspiration from their structures - different but both effective - to seek other contacts with publishers, aggregators, distributors or other projects on a national basis that could be set up in the future (or that Europeana itself could encourage).

On the other hand, a model foreseeing a contribution (financial or other) in exchange for the links from Europeana to sites with content for which the user has to pay is not recommendable. **The provision of ways to access in-copyright works through Europeana, thus contributing to fill a gap in its comprehensiveness, is already a fair return for the visibility granted by the links on Europeana.** In addition, it is non-discriminating - while a fee for the linking would disadvantage smaller players which would nonetheless have valuable material to contribute to Europeana. The most important element is that the system is maintained open to all interested players.

In order to increase the number of companies willing to engage in such activities, it is **essential to incentivise European companies** to do so by, for example, providing financial assistance for publishers to digitise their catalogues, or by envisaging tax incentives for contributing to the Europeana project. An example can be seen in France where the Centre National du Livre has provided economic funds for the digitisation of books for publishers in exchange for the indexation of the works benefiting from such funds in Europeana.

More recently, the French Minister of Culture and the French Secretary of State for Strategic Studies and the Development of the Digital Economy proposed to use the bond that the French government intends to issue soon with a view of boosting the economy in order to finance the accelerated digitisation of the French written cultural heritage.

An interesting approach could also be to **foster private sponsorship** in exchange for example for advertising (commercial objectives) or to demonstrate corporate social responsibility. An example of such a sponsorship is Telefónica and the Spanish National Library¹¹. The Spanish internet service provider, Telefónica, has an ongoing technological collaboration to digitise public domain works that will be part of Europeana from 2010 onwards.

When entering into such partnerships for the digitisation of public domain books, it may be relevant for libraries to make sure that these are **governed by transparent and balanced conditions**. These should take into account the importance of (a) having a back-up of the master copy of what is digitised in several formats, the right to use them on the libraries' website and contribute to Europeana, (b) ensuring a wide visibility to those contents on the internet, by allowing their indexation by as many search engines as possible, (c) selecting the books to be scanned, the quality of the scanning, the production of metadata as well as the volume of costs.

¹¹ <http://www.bne.es/en/NavegacionRecursiva/Cabecera/noticias/noticias2008/DigitalizarTelefonica.html>



Conclusion

In our view, Europeana will only achieve its full potential if it continues to work with all cultural institutions and rightsholders together and to explore new ways to **incentivise European companies** to be part of this interesting project based **on respect of IPR and cultural diversity** in Europe. This is not only fully compatible with the final aim of making our common and diverse cultural heritage widely accessible but also a necessary step if we want Europeana to be a success story.