



## **ICOMP Response to the Commission's Consultation on 'Europeana - Next Steps'**

ICOMP, the Initiative for a Competitive Online Market-Place, welcomes this opportunity to offer comments in response to the European Commission's consultation on the future of Europeana.<sup>1</sup> ICOMP strongly supports the Commission's goal of expanding online access to books and other cultural and scientific works. We also believe Europeana can and should play a central role in realising that goal consistent with longstanding copyright protections, which remain vital for providing incentives for creation and ongoing investment in cultural, scientific and other works. In these comments, we set out five principles that we believe should guide policy on Europeana's future development and on expanding online access to works more broadly. We then offer our thoughts on two specific issues raised in the Consultation—how to facilitate the inclusion of copyrighted works in Europeana, and the role of private organisations in funding Europeana and advancing its goals.

### **I. About ICOMP**

ICOMP is an industry initiative for businesses and organisations involved in Internet commerce. Our mission is to advocate sustainable growth of the Internet consistent with the rule of law. Among our key goals are to encourage competition, transparency, and respect for intellectual property rights in the online environment, and the adoption of best practices to promote online creativity, innovation, security and trust. Established in 2007, already over 50 companies, trade associations, consumer organisations and individuals have endorsed ICOMP's principles. These members are drawn from 14 countries across Europe, North America and the Middle East.<sup>2</sup>

ICOMP's work programme has largely centred on sponsoring analyses and symposia that examine how online markets function and the application of competition rules to these markets. ICOMP has contributed to the debate in Europe on book digitisation projects being pursued in other jurisdictions,<sup>3</sup>

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<sup>1</sup> "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Europeana – Next Steps," COM(2009) 440 final (28 Aug. 2009); *see also* "Commission Staff Working Document accompanying the Communication from the Commission on Europeana – Next Steps," SEC(2009) 1124 (28 Aug. 2009), *available at* [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm).

<sup>2</sup> ICOMP is funded by member contributions as well as sponsorship from Microsoft. Burson-Marsteller acts as its secretariat.

<sup>3</sup> *See, e.g.*, "ICOMP Statement on Competition Issues Presented by the Proposed Google Book Search Settlement" (7 Sept. 09), [http://www.i-comp.org/~icomppsb/pdfs/ICOMPStatementGBS\\_070909.pdf](http://www.i-comp.org/~icomppsb/pdfs/ICOMPStatementGBS_070909.pdf)

and we welcome this opportunity to support the Commission's positive vision for expanding online access to books and other works in Europe.

## II. Guiding Principles

Europe has a unique opportunity to become a global leader in the digitisation of books and other cultural works, and to do so in a manner that respects the interests of rights holders while promoting transparency, innovation, access to content, and competition in online services for the benefit of its citizens. To achieve this goal, it is critical that the future development of Europeana (or any similar large-scale digitisation project) be guided by the following principles:

- Included works should be searchable and accessible across Europe. As the Consultation notes, a key goal for Europeana is to provide barrier-free access to works across Europe on consistent terms, regardless of where users are physically located. It is equally vital, in ICOMP's view, that users across Europe (and ideally globally) have the ability to search Europeana's entire database of works with a single search query. Cutting-edge search technologies maximise the value of large databases such as Europeana by helping users quickly find what they are looking for. If users of Europeana are forced to use outdated search technologies, or to run multiple or differentiated searches based on the original source of the digitised work or the user's location, Europeana's value to European users will be greatly diminished.
- The important policy issues raised by book digitisation require an open, transparent, and participatory process. Europeana, like any broad-based effort to digitise and make available works online, necessarily affects many stakeholders and raises important policy issues. ICOMP applauds the Commission's efforts, including through this consultation, to proceed in an open, transparent, and participatory manner. As demonstrated by the many objections to the proposed Google Book Search settlement in the United States, including by European governments and several prominent European organisations, these issues are too important to be decided by a small number of private parties operating in a closed, secret process.
- The regulatory regime should expand user choice, promote competition, and spur innovation. While Europeana has made enormous strides in its short history, it is clear that book digitisation technologies and online access models are still in their infancy. As the Commission formulates the rules that will guide Europeana's future development, it is essential that these rules provide sufficient flexibility to adapt to changing technologies and access models. The overriding goal of the regulatory regime should be to expand user choice and benefits consistent with the interests of rights holders—in particular by spurring technological innovation and promoting competition in the services through which users access Europeana's database of works. We discuss this in more detail below.
- The Commission should seek a solution that allows Europeana to include copyrighted works. Although European publishers and other rights holders are making great strides in expanding online access to works—including works that might no longer be available in hard copy on bookshop shelves—some of Europe's important cultural and scientific heritage is found in works that remain under copyright but for whatever reason no longer are commercially available, including orphan works. Europeana offers a valuable opportunity to breathe new life into these works and to unlock their value for users while potentially providing new

revenue streams for authors and other creators. We encourage the Commission to seek fair solutions that respect copyright while enabling Europeana to include orphan works, and possibly other works that no longer are commercially available. We discuss this issue further in Part III of these comments.

- The Commission should pursue funding mechanisms that leverage private-sector innovation and promote competition. As the Commission notes, Europeana’s success may turn at least in part on its ability to leverage private-sector technologies and attract private-sector support, both financial and otherwise. Our sense, however, is that simple “sponsorship” arrangements and the like might not be the best avenue to involve the private sector, both because these arrangements are unlikely to generate significant revenues, and because sponsorship would do little in terms of leveraging private-sector innovation and entrepreneurialism. A better option, in our view, would be to give Europeana the mandate to grant private-sector entities non-discriminatory and nonexclusive access to its database of works, in exchange for a fee, and allow them to provide value-added services on top of that database. This option would be more likely to generate significant revenues for Europeana and promote competition among suppliers to provide innovative, value-added services for accessing Europeana’s content. We discuss these ideas more fully in Part IV of these comments.

In addition to these overarching principles, ICOMP focuses in these comments on two issues that are central to enabling Europeana to provide high-quality, large-scale access to European cultural works for users—namely: (A) mechanisms to facilitate the inclusion of copyrighted content in Europeana; and (B) the role of private organisations in providing the funding necessary for Europeana to flourish.

### **III. Mechanisms to Facilitate Inclusion of Copyrighted Content in Europeana**

To achieve its goal of expanding access to European knowledge and culture, it obviously would be of value for Europeana to make available digitised versions not only of public domain material, but also of copyrighted works, in particular works that are unavailable through existing commercial channels.

European copyright law rightly grants copyright owners, in addition to moral rights, the exclusive right to exploit the commercial value of their works. It therefore requires would-be users to obtain the copyright owner’s consent before copying, distributing, or otherwise exploiting a protected work. This “opt-in” legal framework, embodied in international treaties to which most nations are party, provides incentives for creativity by ensuring that authors and other creators can capture the economic value of their efforts, and provides the funds for ongoing investment in new works. This ‘virtuous cycle’ of intellectual capital is the economic foundation of all copyright-based businesses. We disagree with those who argue that this regime must be fundamentally altered in order to create a successful online digital library.

Challenges can arise, however, where a rights holder cannot be identified or located despite a diligent search (the ‘orphan work’ situation), or clearly abandons any effort to commercialise its work or otherwise exercise its rights. In those cases, it should be possible for an institution such as Europeana to scan and provide access to such works without fear of monetary liability. So long as measures are in place to ensure that rights holders who do emerge or are located are fairly compensated for such uses and retain the ability to remove their works for the full copyright term, the balance of equities argues in favour of developing mechanisms whereby an institution such as Europeana could digitise and provide

access to orphan works, and perhaps also to certain works that no longer are commercially available, under certain carefully-defined conditions.

Without the ability to include such works, Europeana faces challenges in seeking to add significant numbers of copyrighted works to its database. The problem of orphan works is especially pronounced. Because orphan works are by definition works for which it is difficult or impossible to identify or locate the rights holder, there is often little or no possibility of securing necessary copyright permissions for these works, even after a diligent search for the author.

Europeana's lack of access to orphan works is particularly troubling in light of developments in the United States. As the Commission is aware, through an aggressive business and litigation strategy premised on a narrow reading of copyright, Google currently engages in unauthorised copying and "snippet display" of copyrighted books. The latest version of its proposed U.S. class-action settlement, submitted on 13 November 2009, would still confer upon Google a de facto monopoly over online access in the United States to orphan works. Therefore, if the revised settlement goes forward as proposed, Europeana and any other cultural works databases will find themselves at a distinct disadvantage in the online marketplace.

Equally disturbing is that the revised settlement, by making Google the monopoly gatekeeper to online access to books for U.S. readers, would give Google inordinate influence over the future development of digital libraries, including in Europe. Google would, in effect, determine the model for how consumers and libraries access digitised content, and how authors and publishers are compensated for that access. In short, we believe that the revised settlement does not fix the serious problems that plagued the original settlement and drew vociferous objections from the French, German, and U.S. governments, as well as from authors, publishers, libraries, academics, and consumer groups across Europe and the world.<sup>4</sup>

At the same time, we recognise the value of expanding online access to orphan works and, where possible, other works that are no longer commercially available. The Commission has rightly recognised this issue, as reflected in its recent Communication on "Copyright in the Knowledge Economy."<sup>5</sup> ICOMP looks forward to participating in the "ambitious and comprehensive intellectual property strategy" that will be undertaken by the next Commission.<sup>6</sup> Importantly, these efforts will expand access not merely for the benefit of one company, but rather for all of society.

In the meantime, ICOMP offers these initial thoughts on the core elements of potential solutions that could help promote the availability of copyrighted works on Europeana. The approach outlined below

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<sup>4</sup> In addition to substantial opposition in the U.S. and Europe, the Google Book Search settlement attracted opposition from publishers and authors in China and India, among other nations. See, e.g., Juliet Ye, "Google Books Settlement: The Chinese Chapter," *China Journal* (20 Oct. 2009), <http://blogs.wsj.com/digits/2009/10/20/google-books-settlement-the-chinese-chapter/>; Rituparna Bhuyan, "Centre Protests 'Copyright Violation' by Google Books," *Financial Express*, (9 Nov. 2009), <http://www.financialexpress.com/news/Centre-protests--copyright-violation--by-Google-Books/538935/>.

<sup>5</sup> See "Communication from the Commission - Copyright in the Knowledge Economy," COM(2009) 532 final (19 Oct. 2009), [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/20091019\\_532\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20091019_532_en.pdf)

<sup>6</sup> *Id.* at 4.

would maintain respect for the interests of rights holders while ensuring that works are not unnecessarily excluded from Europeana. At a broad level, we believe differentiated rules are required depending on whether a work is an orphan work, is commercially available, or is no longer commercially available.

- **Orphan works.** ICOMP believes that there are good grounds for limiting liability for copyright infringement in the case of orphan works where a due-diligence search for the author has been made. A notable precedent here is that several Member States already refuse to grant copyright damages awards, and only will grant injunctive relief, in the case of innocent infringement. We also believe, however, that any such arrangement for orphan works should be carefully defined and subject to appropriate due-diligence requirements, to ensure that it is not subject to abuse. While this issue deserves further consultation and debate, we offer the following thoughts on how such a limitation might be crafted to facilitate the inclusion of orphan works within Europeana and elsewhere on fair and reasonable terms.

First, a work should be considered an “orphan” only if the rights holder in fact cannot be identified and located following a diligent search. The guidelines of the Joint Report and Sector Reports created in connection with the European Digital Libraries initiative provide a foundation for defining what constitutes a “diligent search.”<sup>7</sup> A work for which the rights holder can be identified and located, but refuses to authorise use or does not respond to a request for permission to use, should not be considered an “orphan” work.

Second, to make the diligent search process less burdensome for Europeana and others, and to encourage owners of orphan works to come forward, any arrangement to promote digitisation of orphan works by Europeana could be implemented in tandem with reliable orphan works registries. The Accessible Registries of Rights Information and Orphan Works (ARROW) project, launched in December 2008, indicates that such registries are feasible and can play a valuable role in protecting against potential abuse of any orphan works arrangement.

Third, if the rights holder subsequently comes forward after an orphan work has been digitised and used online, there should be a mechanism for providing reasonable remuneration for uses that already have been made of the work. However, good-faith use of orphan works should excuse Europeana or other parties using such copies from monetary damages. One possibility that deserves consideration is a mechanism whereby a party digitising and using an orphan work would be shielded from traditional copyright damages liability in exchange for paying a set fee into a common fund; rights holders coming forward with respect to orphan works would then be paid fair remuneration from that fund.

Fourth, bearing in mind that the primary goal of an orphan works solution is to promote access to works that otherwise might vanish from Europe’s cultural and scientific heritage—and not to benefit individual companies or entities—the first party to digitise an orphan work

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<sup>7</sup> See “Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works - Joint Report” (Jun. 2008), [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/guidelines.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf)

for inclusion in a large-scale online database should be required to allow access to that digitised copy to third parties under fair, reasonable, and non-discriminatory (FRAND) terms.<sup>8</sup> This element is particularly important if Google continues to scan and/or display orphan works by European authors.<sup>9</sup> To the extent Google (or any entity) obtains the benefit of an orphan works arrangement, it should also assume the responsibility of promoting truly open access to that copy, including by competing online services. Without such a FRAND requirement, Google's reliance on a European orphan works scheme could allow it to obtain de facto monopoly control over online access to orphan works in Europe and relegate Europeana and any other digitisation efforts to permanent second-tier status.

- **Commercially-available works.** If a copyrighted work is commercially available, we believe there is no basis for changes to European copyright law that would allow Europeana to digitise and make available the work without the rights holder's consent. This position is not, in our view, incompatible with the inclusion of commercially available works in Europeana. ICOMP encourages the Commission to explore creative means to promote the licensing of copyrighted, commercially-available content for digitisation and inclusion in Europeana. Possible mechanisms to encourage rights holders to license rights to Europeana include the establishment of dedicated voluntary licensing collectives, the development and dissemination of model license agreements, and promotional campaigns targeting rights holders in key cultural sectors. The funding mechanism described in Part IV of these comments—pursuant to which Europeana would give third parties access to its database so that they could provide value-added services on top of it in exchange for payment—could offset at least part of the costs involved in pursuing such options.
- **Non-commercially available works.** Copyrighted works that are no longer commercially available, but which are not “orphans”, present a more difficult case than either orphan works or commercially available works. This is because non-commercially available, non-orphan works implicate two conflicting considerations. On the one hand, rights holders should not lose their exclusive rights in a work merely because they (perhaps temporarily) choose not to exploit the work commercially; indeed, copyright has long given authors and other rights owners the ability to prevent the copying and distribution of their works for any or no reason at all. On the other hand, it cannot be ignored that copyrighted, non-commercially available works could comprise a significant potential corpus for Europeana, and that the administrative costs involved for Europeana in negotiating licenses for these works could be high.

ICOMP is quite willing to contribute to a study, together with other stakeholders and the Commission, to identify mechanisms that would facilitate the making available of such works on Europeana within the existing copyright framework. To that end, the recommendations

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<sup>8</sup> A requirement to allow FRAND access to digitised orphan works does not prevent the imposition of reasonable conditions, such as a requirement that the work not be displayed alongside objectionable content, or that it identify the source of the copy.

<sup>9</sup> The revised Google Book Search settlement, submitted to a U.S. court on 13 Nov. 2009, would grant Google access to any book published in the United Kingdom, Australia and Canada, as well as any book ever registered with the U.S. copyright office (regardless of the book's origin).

applicable to out-of-print works that were outlined in the Final Report of the High Level Expert Group - Copyright Subgroup (4 June 2008) provide a helpful foundation.<sup>10</sup> If such efforts fail to lower meaningfully the transaction and administrative costs of seeking online rights to non-commercially available works, the Commission could consider other, more proactive measures, such as use of an opt-out mechanism (or 'deemed' opt-in mechanism) in certain limited and carefully defined circumstances. ICOMP looks forward to working with the Commission and other stakeholders in exploring reasonable, practical options that are consistent with longstanding European and international copyright principles.

#### **IV. Role of Private Organisations in Funding Europeana**

As the Commission recognises, its goals for Europeana will require substantial funding. We welcome the Commission's openness to innovative funding mechanisms, including public-private partnerships, and look forward to discussing the pros and cons of the various options with the Commission and other stakeholders as this process moves forward. Yet many of the public-private partnership options mentioned to date, such as the payment by private organisations for sponsored links on Europeana, are unlikely in our view to generate the substantial sums necessary to make Europeana a success. These options also would do little to leverage market incentives and entrepreneurialism or to spur competition in providing innovative services for accessing the database of books and other cultural works that Europeana is creating.

A more promising option, in our view, would be for the Commission to require Europeana to allow private-sector entities to access, and build value-added services on top of, the Europeana database of works. For example, an online educational institution offering instruction on Impressionist Art could pull in copies of works on that subject from the Europeana database and offer innovative access and search options on top of it. As another example, operators could offer specialised applications and services that facilitate searching and viewing of works in the Europeana database on mobile devices. Such partnerships would advance Europeana's goal of expanding access to European knowledge and culture, but in ways that leverage private-sector innovation and market incentives and avoid the inefficiencies of having other parties invest vast sums into creating their own database of European works (which at best would be duplicative of Europeana's own database).

Offering private-sector access to Europeana's database could also provide an important source of funding. The price for access could be based on a lump-sum payment, a percentage of revenues generated by the service, level of use, or some other formula. Fees could also vary depending on whether the accessing party is a public entity, a private non-profit, or a for-profit company.

Given that Europeana is a public institution with access to unique works of cultural importance, it would be appropriate for access to be granted on fair, reasonable and non-discriminatory (FRAND) terms. FRAND terms will ensure that no single entity is able to obtain a monopoly or other unfair advantage over the cultural heritage of Europe. It would also spur competition among suppliers, resulting in

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<sup>10</sup> "Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works," i2010 Digital Libraries High Level Expert Group - Copyright Subgroup, 17-22 (4 June 2008), [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/reports/copyright/copyright\\_subgroup\\_final\\_report\\_26508-clean171.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf)

multiple innovative outlets through which European users can access Europeana's content. As ICOMP explained in connection with the Google Book Search settlement, digitisation should expand user choice, promote competition, and spur innovation.<sup>11</sup>

Offering FRAND access to the Europeana database would not preclude Europeana from imposing terms that ensure content is used in ways consistent with Europeana's mission. For example, it would be entirely reasonable for Europeana to require that content be provided in a manner that identifies the contributing cultural institution and Europeana itself.

Alternatively (or in addition), the Commission could seek to stimulate funding by operating Europeana as a federation or partnership of public- and private-sector entities that are authorised to engage in scanning of books and other cultural works. This federation of entities could share the costs of scanning and indexing works and making them searchable, in exchange for access by each participant to the entire database of works scanned by the partnership as a whole. This approach would enable funding of Europeana, while making the cultural heritage of Europe broadly accessible on the Internet. ICOMP would be pleased to explore these options further with the Commission as this Consultation moves forward.

## **V. Conclusion**

Greater access to knowledge, books and other cultural works through digitisation is a laudable and important goal. It is refreshing to see Europe pursue a path towards wide-scale digitisation that embraces transparency and respects the interests of rights holders. As it continues on that path, the Commission should promote market-based mechanisms to encourage digitisation of copyrighted materials while also taking steps to reduce the costs and administrative burdens that Europeana faces when seeking to obtain authorisation from rights holders, especially where such rights holders are difficult to identify or locate. Furthermore, both to ensure sufficient funding for Europeana and drive innovation in value-added services, the Commission should give Europeana the mandate to grant third parties access to its content database on fair, reasonable, and non-discriminatory terms.

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<sup>11</sup> See note 3, *supra*.