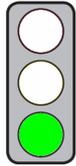


## MAIN ISSUES

**Objective of the Communication:** The Commission wishes to increase the online cultural database collection "Europeana" to include 10 million objects by 2010 and to ensure sustainable financing for the project.

**Groups affected:** Publishers, authors, museums and libraries.



**Pros:** (1) Europeana can contribute significantly to the digitisation of works for which there is no commercial interest.

(2) Harmonised rules for dealing with the problem of orphan works avert legal grey areas.

**Cons:** –

## CONTENT

### Title

**Communication COM(2009) 440** of 28. August 2009: **Europeana – next steps**

### Brief Summary

#### ► Content and aims of the Communication

- In November 2008, Europeana was opened as an online library, museum and archive aiming to make Europe's cultural and scientific heritage accessible on the internet to all.
- Currently Europeana's collection consists of 4.6 million digitised books, newspapers, video clips, maps, photographs and documents provided by more than 1,000 cultural institutions. 47% of all hitherto collected objects have been provided by France. However, the Commission assumes that the situation will be "balanced out gradually".
- The Commission is planning to increase Europeana's collection by 10 million objects by 2010. To this end, it calls Member States to contribute to a "sustained digitisation".
- The Commission is using past experience and the planned further development of Europeana as an occasion to instigate a debate on Europeana's content and on EU copyright, as well as to propose a sustainable financing model for Europeana.
- The Commission is planning a revision of the Copyright Directive (2001/29/EC).

#### ► Copyright

##### Inclusion of in-copyright works

- Many contemporary documents of the 20th century are protected by copyright. The Commission fears that there might be a "20th century black hole" in Europeana if the barriers resulting from copyright are not resolved. Therefore, it is considering the following options:
  - Europeana, or its collaborating cultural institutions, could enter into agreements with rightholders to digitise in-copyright works against the payment of a fee. The Commission deems this model particularly reasonable where out-of-print books and older newspapers are concerned.
  - Another option would be to provide users not with direct access to in-copyright works but to refer them to websites operated by their rightholders. Thus the latter could decide to which extent they wish to make in-copyright contents visible on Europeana.
- Irrespective of the form in which in-copyright works are included, the Commission considers it essential that the extent of authorised use is standardised throughout the entire EU so as to avoid nationally limited "silo structures".

##### Facilitated use of "orphan works"

- The Commission intends to facilitate the use of works which are still in-copyright but whose rightholders are difficult to be found, or not found at all ("orphan works").
- Following the public consultation of the Green Paper on copyright in the knowledge economy (cp. [CEP Table of Content](#) in German only) submitted in July 2008, the Commission intends to prepare an impact assessment on the digitisation procedure of orphan works soon.
- Currently the Commission is assessing the impact of a settlement agreement with which Google Inc. concluded a lawsuit filed by an association of rightholders ("Google Book Settlement") and which was provisionally approved by the competent District Court of the US State of New York.

### Limitations of copyright protection of older works

- In Europe and in the US copyright protection expires 70 years after the death of the rightholder. However, in the US this rule applies only to works published after 1922. Older works in the US are deemed to be in the public domain and thus can be made available more easily than in the EU.
- According to the Commission, the different handling of copyright protection for older works in the US and in the EU is problematic. Therefore, it is advocating that the creation of registries for orphan and out-of-print works in the EU be speeded up. As an EU alternative it proposes the “pragmatic use” of a cut-off date in the past as an effective date for copyright protection (cut-off date rule).

### Legal consequences for the digitisation of works in the public domain

- The Commission is of the opinion that works in the public domain should not be locked up by copyrights due to their digitisation. However, as the preconditions for creating copyrights are not harmonised throughout the Member States, such an action cannot be entirely excluded.
- Many cultural institutions assert their rights concerning digitised works in the public domain or charge fees for the downloading of digitised copies to cover their digitisation costs. The Commission raises the question of whether it is acceptable to “lock up” the access to cultural works that have been digitised with public funds.
- Where the digitisation of public domain works is possible only through the financial participation of private third parties, they should be entitled to exclusive exploitation rights only for a limited period of time.

### ► Financing

- Until 2013 the development of Europeana will mainly be funded with public money. The total EU budget for this project is EUR 7.5 million. Further co-funding will be provided by the Member States.
- Beyond 2013, financing is to be mainly provided through public private partnerships and contributions by the Member States.
- The Commission also expects some modest website revenue. Making the end user pay, however, is an option denied by the Commission.

## Changes Compared to the Status Quo

Currently there are no changes foreseeable.

## Statement on Subsidiarity

The Commission does not address the question of subsidiarity.

## Policy Context

Following the suggestion of six Heads of State and Governments (DE, FR, IT, HU, ES, PL) dated 28. April 2005, the Commission launched the “digital libraries initiative” in September 2005. The technical works are co-financed through EU funds.

The Commission has brought together cultural institutions, representatives for rightholders and technology firms and academics to form a “High Level Group” to engage in key issues of copyright, public private partnerships and scientific exchange. This group has, amongst other things, developed a model license for the digitisation of out-of-print works and an agreement on guidelines for the systematic search for rightholders of orphan works.

Currently, EU copyright is governed by the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Directive 2001/29/EC), which is still to be revised. With its Green Paper on copyright in the knowledge economy [COM(2008) 466; cp. [CEP Table of Content](#) in German only], the Commission has instigated a debate on changes to European copyright in order to take more into account the public interest in having as broad a range of access to knowledge as possible. In so doing, the author archive “Arrow” serves as a supporting tool in searching for rightholders and finding out whether a work is orphaned or out of print.

## Options for Influencing the Political Process

Leading Directorate General:

DG Information Society and Media

Consultation procedure:

Any interested party may comment. The procedure ceases on  
15. November 2009;  
[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm)

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

In principle, there are no objections to the Commission's target to make "Europe's cultural and scientific heritage" available on the internet. However, incentives already exist in the market for achieving that target commercially, as the access to music, images or text files can be provided against payments. Should users demand it, the relevant offer can be created. Therefore, **Europeana should aim at collecting, digitising and making available those contents which are unlikely to be provided for commercial purposes.**

Moreover, **it is appropriate to include the contents of public museums and libraries in Europeana provided those institutions hold the copyrights of the contents.** After all, it is the aim of such institutions to make available to the majority of people the mostly subsidised, broad access to important cultural assets. However, the collections of public institutions often contain many works whose rightholders provide their own online services, such as academic publishers. If such works are to be included in Europeana, the respective licenses must be acquired.

The decision not to charge users for accessing Europeana, as proposed by the Commission, is a political one. Economically speaking, there is no reason why users should not contribute to the costs for digitisation or to their operating expenses. If payments are waived, the public will have to bear the costs through taxes.

The concern that the widespread digitisation of books, artworks and recordings through private undertakings could create monopoly positions is justified at first sight. However, copyright always generates monopolies, even in the exploitation of "classical" books, artworks and recordings. Therefore, the current digitisation of single market actors does not create any new threats. Everyone is free – as are public authorities – to acquire the rights for digitisation from rightholders. And, of course, rightholders are also free to deny the release of a work for digitisation, or to permit it subject to certain conditions.

Cause for concern is the fact that individual enterprises exploit the legal grey areas, for instance by labelling - arbitrary - works orphaned, and then digitising them. Therefore, **it is to be welcomed that the Commission is pushing for harmonised rules for dealing with orphaned works.** Binding guidelines can set harmonised requirements for tracing rightholders (cp. Memorandum of Understanding on Diligent Search Guidelines for Orphan Works). The guidelines could ensure that a work is not categorised as orphaned too quickly. For instance, it would be justified to declare a work orphaned and release it for digitisation only if the search for a rightholder through databases, such as "Arrow", has proved unsuccessful. In such a case, author associations should hold the royalties in trust for a certain period of time, since the rightholder might be found at a later time.

The discussed option to adjust copyright to the legal position of the US by introducing a "pragmatic" cut-off date rule should be rejected. For it cannot be excluded that the author of a work that was published before 1923 has not yet been dead for 70 years. Here, too, the copyrights, which might in the meantime be in the hands of the heirs, must be respected. The focus really should be on the Commission's proposal to intensify the search for rightholders so as to speed up the process of finding orphan books.

#### Impact on Growth and Employment

If digitisation helps to spread more quickly knowledge that leads to innovation within the economy, then positive effects on growth and employment are to be expected. However, the innovative energy of an economy can also suffer under too lax copyright conditions: authors might lose the motivation to generate new knowledge.

#### Impact on Europe as a Business Location

Clear rules for copyright protection increase the quality of Europe as a business location.

### Legal Assessment

#### Legal Competence

The EU has no independent competences in the field of copyright. Any activities in this area can be merely based on Art. 95 TEC, provided the rules concerned serve the establishment or functioning of the internal market. The rules discussed by the Commission regarding an EU-wide use of protected, orphaned and out-of-print works fulfil this requirement.

#### Subsidiarity

In order to facilitate the use of in-copyright works throughout the entire EU, it is best to regulate such use at EU level. The same is true for the rules regarding orphaned or out-of-print works to be used EU-wide.

#### Proportionality

Currently, it is not yet foreseeable whether or not the revision of the Directive 2001/29/EC will restrict authors' rights in favour of an eased access to knowledge. In any case, in future, when creating rules, the EU should not allow itself to be misled by competing private providers such as Google Inc. to carry out excessive intervention

into the protection of copyrights. The standards stipulated within international agreements (Bern Convention und World Copyright Treaty) should be adhered to. Pursuant to these rules, authors hold the exclusive right to make the original or copies of their work available to the public (Art. 6 World Copyright Treaty). The current practice of Google Inc. to digitise in-copyright works and to disseminate those digital versions as long as the author does not dissent, is not in compliance with said standard rules. The US-American Ministry of Justice shares this view in its statement on the Googles Book Settlement.

Problems also arise in connection with out-of-print works. Also in their case the rights and interests of authors must be adhered to. It must always be respected that in the end it is the rightholder who may decide on his or her work. For it is not unusual that a work is not reprinted due to the fact that an author wishes to distance him or herself from the content of their works. A digitisation would run counter to such interest.

#### Compatibility with EU Law

An author holds the exclusive right to make his or her work available to the public in a digitised form (Art. 3 (1) of the Directive 2001/29/EC). The authorisation granted by an author to make his or her work available to the public is not automatically applicable to all Member States of the EU (Art. 3 (2) of the Directive 2001/29/EC). This provision should be modified in order to avoid the "silo effects" feared by the Commission. EU law also provides authors with the exclusive right for reproduction and distribution by sale or otherwise (Art. 2 and Art. 4 of the Directive 2001/29/EC). The Commissions idea to include in-copyright works in Europeana are in line with these provisions.

#### Compatibility with German Law

§ 16 of the German Copyright Act (*Urheberrechtsgesetz – „UrhG“*) entitles an author to decide for him or herself whether their work is to be reproduced or not; by reproduction the scanning of works is also meant (German Federal Court of Justice, Decision of 5. July 2001 – I ZR 335/98). However, it is permitted to display works available to the public on the internet as a full text by way of a link (German Federal Court of Justice, Decision of 17. July 2003 - I ZR 259/00).

### Alternative Actions

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### Possible Future EU Actions

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### Conclusion

Europeana can make an important contribution to the digitisation of works in which there is no commercial interest. Moreover, the collections of public European cultural institutions can be made available to a wider public, provided a prior approval has been given by all rightholders. It is to be welcomed that the Commission is pushing for harmonised rules for dealing with orphaned works.