

Europeana copyright policy mandate (updated Dec 2016)

This document contains an outline of the updated mandate for Europeana Foundation (“Europeana”) to engage in copyright policy advocacy activities on behalf of the Europeana Network Association (“the Network”). It builds on mandate established in Europeana's [2014 response to the European Commissions Consultation on the review of the EU copyright rules](#).

Scope

The Copyright Mandate allows Europeana to engage in copyright policy advocacy activities on behalf of the Network.

Background

In the light of the European Commission's 2016 copyright reform proposal and more specifically the [proposal for a Copyright in the Digital Single Market directive](#) the Europeana Board identified a need to update the 2014 mandate.

This updated 2016 mandate outlines the policy objectives of Europeana, defines Europeana's level of engagement in relation to the issues at hand and identifies relevant stakeholders for Europeana to work with towards realizing the objectives. It augments the objectives described in Europeana Foundation's response to the 2014 consultation.

Based on a point by point analysis of both [Europeana's response to the 2014 consultation](#) and of [the Commission's proposal for a Copyright in the Digital Single Market directive](#) the copyright working group of the Europeana Network Association has identified 12 policy issues that Europeana should engage on with varying degrees of effort. These 12 issues are grouped according to the agreed level of engagement:

- Issues core to Europeana and the Network
 - 1.1 Out of commerce works
 - 1.2 Digitization (preservation)
- Issues with direct relevance to Europeana Foundation
 - 2.1 Text and data mining
 - 2.2 Online educational activities
- Issues with direct relevance to members of the Europeana Network
 - 3.1 Document delivery and on site consultation
 - 3.2 Implementation of the Marrakesh treaty
 - 3.3 Claims to fair compensation
- Issues that should be monitored by Europeana
 - 4.1 Term of protection
 - 4.2 Hyperlinking
 - 4.3 Protection of press publications
 - 4.4 Online platforms (UGC)

- 4.5 E-lending

Advocacy Objectives

This section outline each issue as an advocacy objectives of Europeana, and the agreed level of engagement.

1. Issue core to Europeana and the Network

The core issues are addressed by the European Commission's proposal for a Copyright in the Digital Single Market Directive and form the main focus of Europeana's advocacy efforts. Europeana has advocated for getting these issues addressed since 2014 and it is logical to continue to engage on them during the legislative process.

1.1 Out of commerce works

Finding a solution for access to Out of Commerce (OoC) works in in the collections of cultural heritage institutions would provide the basis for filling [the 20th century black hole](#). The Commission has proposed to address this issue by way of an "EU legislative intervention (i) requiring Member States to put in place legal mechanisms to facilitate collective licensing agreements for all types of OoC works and to foster national stakeholder frameworks, and (ii) giving cross-border effect to such legal mechanisms."

While Europeana welcomes the inclusion of a measure aimed at addressing this issue in the Commission's proposal, it is clear that (i) the proposed measure (which builds on the existing [MoU on out-of-print works](#)) does not provide a comprehensive solution where appropriate licensing mechanisms do not exist and (ii) that its technical implementation is very limited and thus of limited use to the cultural heritage sector.

Advocacy objectives: Europeana should actively engage on this issue and should follow a two pronged approach to (i) provide a fallback mechanism to the Commission's proposal for sectors and types of works where a licensing solution does not exist and (ii) Europeana should work with the legislators and other stakeholders on maximizing the usability of the licensing based solution proposed by the Commission.

With regards to the first approach, Europeana should explore the possibility to add elements of an exceptions based approach to the Commission's proposal that would be aimed at providing a solution in areas where collective licensing does not exist and therefore cannot reasonably be expected to provide a solution. This could be done through:

- Working with relevant stakeholders (including legislators) with the aim of agreeing on a solution, which will apply where the licensing option does not exist. This includes discussing with organisations representing rightholders, the Commission and other legislators on the possibility of introducing a

provision (similar to the one found in Art 4.2 of the Commission's proposal), which would allow cultural heritage institutions to make OoC works in their collection available online for non-commercial purposes under an exception where a licensing solution does not exist. This requires that Member States (in consultation with stakeholders) ensure that the exception does not apply in sectors, or for types of works, where licensing based solutions such as those provided by the Commission's proposal are available or can be expected to become available.

With regards to the second objective Europeana should work with all relevant stakeholders to adjust the language proposed by the Commission in order to realise the full potential of a licensing based approach.

1.2 Digitization (preservation)

The Commission has proposed to address the issue of digitisation for preservation by introducing a new "harmonised exception for preservation purposes by cultural heritage institutions". Europeana welcomes this new mandatory exception which will provide legal certainty to many of Europeana's data providers.

Advocacy objective: Europeana should actively engage on this issue to ensure that the proposed exception includes digitization of collections in its scope.

2. Issues with direct relevance to Europeana

2.1 Text and data mining

The Commission has proposed to introduce a new "mandatory exception applicable to public interest research organisations covering text and data mining for the purposes of both noncommercial and commercial scientific research". From Europeana's perspective this exception is too limited in its beneficiaries and will undermine the ability of all other actors, including cultural heritage institutions and aggregators such as Europeana to engage in Text and Data mining.

Advocacy objective: Europeana should continue to support stakeholders from the Library and Research communities that work towards ensuring that the proposed Text and Data mining exception is as broadly applicable as possible. Specifically Europeana should advocate for the inclusion of cultural heritage institutions and their aggregators to be among the beneficiaries of the proposed exception.

2.2 Online educational activities

The Commission has proposed to introduce a new "Mandatory exception with a cross-border effect covering digital uses in the context of illustration for teaching, with the option for Member States to make it (partially or totally) subject to the availability of licences". The scope of the proposed exception is considerably more narrow than the "exception covering all uses of all types of works for illustration or

teaching in all educational contexts" that Europeana has been calling for in its 2014 mandate. As a result it is questionable if this exception will contribute to a more widespread use of in copyright materials held by cultural heritage institutions for educational purposes.

Advocacy objective: Europeana should support stakeholders that work towards broadening the scope of the proposed online education exception or other legislative interventions with a similar effect. Europeana should do this by providing case studies that illustrate the need for a broad exception to unlock the educational potential of the online collections made available by Europe's cultural heritage institutions.

3. Issues with direct relevance to members of the Europeana Network

3.1 Document delivery and on site consultation

The Commission has not proposed any legislative measures that relate to online document delivery and to on site consultation of works in the collections of cultural heritage institutions. From the perspective of libraries both issues need to be part of an update to the EU copyright framework that takes into account the needs of libraries and the wider cultural heritage sector in the Digital Single Market. The existing on-site consultation exception needs to be stripped of its anachronistic limitation on access via 'dedicated terminals' and there need to be clear rules for online document delivery.

Advocacy objective: Europeana should support library organisations (and other stakeholders working towards these goals) in efforts to update the on-site consultation exception and to introduce an exception enabling online document delivery.

3.2 Marrakesh treaty

The Commission presented a proposal for a Directive and a Regulation on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled. Both instruments are intended to implement the obligations arising from the Marrakesh treaty into EU law. The Commission's proposal is welcome and is not expected to be controversial.

Advocacy objective: Europeana should not actively engage on this issue but should support stakeholders who are working towards an as quick as possible implementation of the Marrakesh treaty.

3.3 Claims to fair compensation

The Commission is proposing the introduction, in EU law, of the possibility for Member States to provide that publishers may claim compensation for uses under an

exception. This is intended to restore the pre-CJEU ruling in the Hewlett Packard Belgium-Reprobel situation in which compensation for uses under an exception could be shared between publishers and authors.

Advocacy objective: Europeana should not actively engage on this issue but should support stakeholders who support the adoption and implementation of the Commission proposal of Article 12 and the corresponding Recital 36 of the draft Copyright Directive.

4. Issues that should be monitored by Europeana

4.1 Hyperlinking

While the Commission's proposal do not include any measures that would alter the legal status of hyperlinks, this is an area of intense lobbying. There is also growing body of case law from the CJEU in this area. As an aggregation platform Europeana makes extensive use of linking to remote resources and it is crucial for Europeana's ability to operate that the hyperlinking remains an activity not covered by copyright. The same is true for a large number of members and other aggregators within the Europeana Network.

Advocacy objective: In the current situation there is no need for Europeana to engage on this issue. However this does not change Europeana's position as expressed in 2014. In the event that the question of hyperlinking and issues related to this - like "framing" as a copyright relevant act in the future, Europeana should continue to oppose such attempts.

4.2 Term of protection

This issue is not being addressed by the Commission's proposal. The excessive duration of copyright protection for works that are not actively exploited by their rightsholders continues to be an important cause of the copyright related problems faced by the cultural heritage sector.

Advocacy objective: In the current situation there is no real opportunity for Europeana to advocate for a shortening of the term of protection. However this does not change Europeana's position as expressed in 2014. Europeana should however monitor this issue and oppose any attempts to lengthen the term of protection, should such attempts be (re)introduced during the legislative process.

4.3 Protection of press publications

The Commission is proposing the "introduction in EU law of a related right covering digital uses of press publications". This issue has the potential to negatively affect the cultural heritage sector, especially those who provide access to press publications. An additional layer of rights can be expected to increase the complexity and thus cost of clearing rights to make press publications available online.

Advocacy objective: At this moment Europeana should not actively engage on this issue. It should however monitor developments to ensure that the Commission's proposal does not have any negative effects on the cultural heritage sector (for example through retroactive application, or by extension to other types of publication such as STM publications) and should support other friendly stakeholders in efforts to ensure that the introduction of a new right for press publishers is fit for purpose and does not negatively affect the access to information.

4.4 Online platforms (UGC)

The Commission is proposing to introduce "an obligation on services which store and give access to large amounts of content uploaded by their users to put in place appropriate technologies together with more transparency". While this proposal seems to be primarily directed at large commercial UGC platforms, it cannot be ruled out that modifications of the proposal during the legislative process expand its scope so that it would also apply to UGC activities of Europeana and members of the Network.

Advocacy objective: Europeana closely should monitor the issue and oppose any changes that would result in Europeana (and other cultural heritage aggregation platforms) being included in the scope of this measure

4.5 E-lending

The Commission has not proposed any legislative or other measures that deal with e-lending. As a result of the CJEU ruling on e-lending which allowed electronic lending under certain conditions it is currently not expected that this issue will be dealt with through legislative measures on the EU level. As a result of this we do not foresee any need for advocacy activities on the short term.

Advocacy objective: Europeana should monitor for legislative developments related to the question of e-lending and support library organisations and other stakeholders in efforts to ensure that there is a clear legal framework for e-lending.

Mandate Approval

This updated mandat has been approved by the Members Council of the Europeana Network Association on the 6th of December 2016. In line with the principles established of the Europeana Advocacy framework members of the Europeana Network have the ability to register their dissent with the objectives expressed above. The following organisations have registered their (partial) dissent:

- The Federation of European Publishers (FEP) and The International Federation of Reproduction Rights Organisations (IFRRO) support objectives 1.1, 1.2, 3.2, 3.3 and 4.5
- The Spanish Ministry of Education, Culture and Sport notes that regardless of its

participation the Europeana Network this must in no way be read as expressing the position of the Kingdom of Spain.

- The Bibliothèque nationale de France (BnF) notes that with regards to copyright policy it follows the position of the French Ministry of Culture and Communication, which sits in the relevant European bodies. However, the BnF agrees to support objectives 1.2 and 3.2. Concerning the objective 2.1 the BnF supports it provided that the exception is only applicable for non-commercial use.