



Europeana Sounds

Policy Recommendations
for improving online access
to audio and audio-related
heritage in Europe



Colophon

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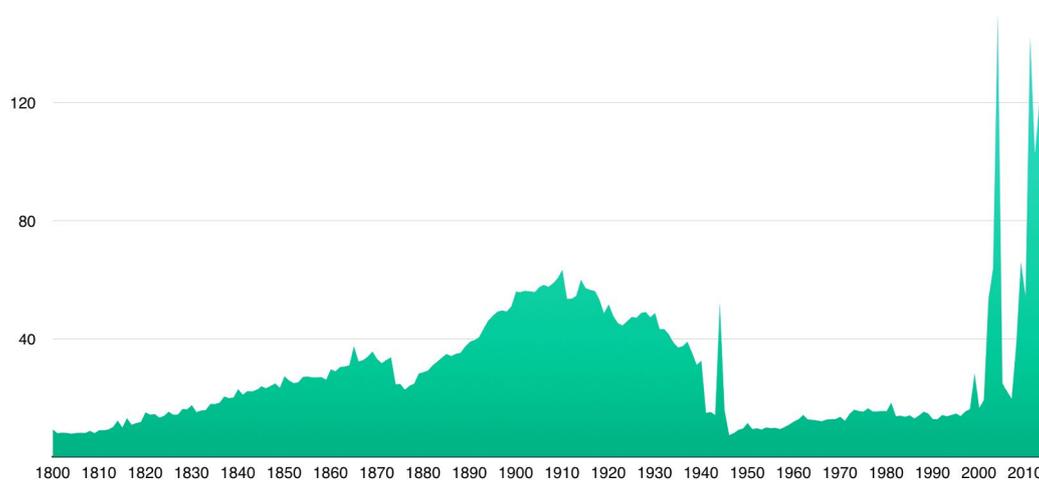
Introduction

The Europeana Sounds project is a best practice network, combining sound and music (audio) heritage institutions from 12 countries across the European Union Member States, together with non-profit organisations, and commercial companies. Europeana Sounds' mission is to substantially increase public online access to European audio and audio-related heritage, as the project partners firmly believe that this will not only provide benefits for research, education and culture but also foster innovation and reuse for social and economic gain.

This report provides supporting evidence for seven recommendations that, when adopted, will result in a significant improvement to online access to audio and audio-related heritage in Europe. The first chapter explains why the Europeana Sounds project partners see a need for an update to the the European copyright and related rights legal framework. This includes the limitations of the current exception for reproduction and the existing (limited) solutions for out-of-commerce and never-in-commerce works through the Memorandum of Understanding (MOU) and Extended Collective Licensing (ECL). The second chapter focuses on how access to rightsholder information could be improved. It discusses the directive on collective management of copyright¹, suggested improvements to the access of information about works that are in the Public Domain and the need for a comprehensive register of CMOs. The final chapter discusses how Cultural Heritage Institutions (CHIs) can improve online access to audio and audio-related heritage with clear guidance on other legal or non-legal factors, such as privacy or ethically or culturally sensitive content management.

For CHIs, the intention to encourage widespread online public access to collections is often only achievable if and when the hurdles of preservation and digitisation are overcome. For collections which hold in-copyright works, the additional work required to identify, locate, and obtain permission from rightsholders requires significant resources. Often substantial time is spent to clear rights but in a significant number of cases it does not result in the works being made available - as illustrated in the figure below. The graph shows that modern materials (where the rightsholder is active) are available in Europeana in significant numbers. This is also the case for material that was created over 70 years ago, because of the duration of copyright of life +70 that exists in most EU member states.

1 The Directive can be read here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026>.



Graph 1: The 20th century black hole as observed in Europeana (data from September 2015). Y-axis: the number of digital objects available (in thousands) on the X-axis the spread of these digital objects per decade.²

As an audio specific example, a vital part of fulfilling the 7 year project *Images for the Future*, financed by the Dutch government, was the digitisation of 310,566 hours of audio works. Of that, only 0.04% is publicly available online and only 0.02% is in the Public Domain or openly licensed, despite extensive efforts in rights clearance.³

It is clear that current copyright law limits what is made available online by CHIs. Institutions often prioritise works that they can determine to be in the Public Domain because copyright and related rights have expired. Whilst works in the Public Domain offer access and reuse opportunities, they currently do not truly represent the full extent of the rich Europeana cultural heritage that institutions *should* make available. Instead it represents what they *can* make available. The Europeana Sounds project partners know that within the area of digital humanities the 19th century is overstudied, while the 20th century is understudied because of the lack of digital materials available for researchers online. The graph and these examples together show the 20th century black hole in online public access to digital heritage.

Europeana Sounds, now in its final year, has already made available more than 450,000 audio and audio-related items via Europeana. The project will double the amount of audio heritage that was previously available through Europeana. The rights statuses of audio and audio-related collections are diverse, each with different challenges to overcome before they can be made available online to the public. Hurdles range from collections that consist of never-in-commerce works and where rightsholders are difficult to trace, through to Public Domain works where the rights status is time intensive to verify, and collections where works will still be actively managed by rights-holders or representatives.

² Read more about the 20th century black hole and the methodology used to show it, here: <http://pro.europeana.eu/blogpost/the-missing-decades-the-20th-century-black-hole-in-europeana>.

³ You can view the end-report of *Images for the Future* here (in Dutch): http://beeldenvoordetoekomst.nl/publicatie/BVDT_eindpublicatie_web.pdf.

To help understand how CHIs can best manage and provide online access to in-copyright audio and audio-related works, the project is supported by two in-depth research reports. The first, authored by GESAC, is based on first-hand experience and recommendations from author and composer rights holder representatives on how to manage audio and audio-related works practically, following the current procedures of collective management organisations.⁴ The second report, by the Institute for Information Law from the University of Amsterdam (IViR), identifies the extent of copyright-related challenges in the context of Europeana Sounds. It aims to provide guidance on how these barriers can be addressed, combining legal principles with best practice.⁵

The outcome of these reports is clear in identifying the ongoing challenges CHIs face. CHIs operate as custodians of in-copyright works, where obtaining copyright permission is time consuming, often impossible to secure, and expensive when licensing costs are involved. The CHIs also represent the public interest in providing online access to audio and audio-related works. The project partners have therefore concluded that a reform of EU copyright rules will help facilitate easier online access to digitised cultural heritage, focussing specifically on audio- and audio related heritage. This document outlines some suggested reforms that the project partners believe would be beneficial to putting more European audio heritage online.

Towards a modern, more European copyright framework

The European Commission is already in the process of changing copyright rules, as laid out in its Communication on December 9th 2015⁶ and will present concrete legislative proposals during September 2016. Specifically the Commission has announced the intention to:

- provide a clear space for preservation by cultural heritage institutions, reflecting the use of digital technologies for preservation and the needs of born-digital and digitised works;
- support remote consultation, in closed electronic networks, of works held in research and academic libraries and other relevant institutions, for research and private study;

4 You can read the GESAC report (2015) at: http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Sounds/Other%20documents%20related%20to%20the%20project/Europeana%20Sounds%20GESAC%20Report.pdf.

5 You can read the IViR report (2015) at: http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Sounds/Other%20documents%20related%20to%20the%20project/Europeana%20Report%20by%20IViR%20final.pdf.

6 Please find the Communication here: http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=12526.

- make it easier to digitise out-of-commerce works and make them available, including across the EU.
- support rightsholders and distributors to reach agreement on licences that allow for cross-border access to content, including catering for cross-border requests from other Member States, for the benefit of both European citizens and stakeholders in the audiovisual chain.

To help inform the Commission’s ongoing work on these proposals and to share our position on updates that would significantly benefit the long-term goals of the audio-heritage sector, the project partners have developed seven policy recommendations.

Seven recommendations to improve access to digitised audio and audio-related heritage

The seven recommendations fall into three sets: The first set addresses the legal framework in the area of *copyright and related rights*. The second set outlines issues related to *rights clearance and the availability of rights information*. The last addresses *other legal barriers and ethical considerations* which can arise when considering online access to audio and audio-related heritage.

The project partners believe that adopting these seven recommendations would significantly help fulfil their task to provide online public access to European audio and audio-related heritage. This would enable European citizens to benefit from access and reuse of a representative and diverse online corpus of Europeana audio and audio-related heritage.

i. Update The European Copyright and Related Rights Legal Framework

The project partners recommend;

- 1 that the European legislator updates Art 5(2)c of the Information Society Directive (2001/29/EU) to allow all acts of reproduction of in-copyright works in the collections of beneficiary institutions for all non-commercial purposes related to their public-interest mission, and to make this exception mandatory for all Member States⁷.

⁷ The Bibliothèque nationale de France (BnF) expresses reservations on this recommendation because at the date of the drafting of the present report, the French Ministry of Culture is not in favour of making mandatory the implementation of the exceptions existing in the Directive 2001/29/EC.

2 for the European Commission to further investigate whether approaches that give pan-European access for out-of-commerce printed works, such as those adopted by Germany and France, can serve as a model for making available sound and audiovisual heritage.

3 that the European legislator creates a legal mechanism to address the issues of making available online audio and audio-related works no longer commercially available⁸, as well as works that have never been in commerce at all.⁹ The project partners recognise that some efforts have been made to address this, such as national approaches including ECL and national implementations of the MOU on out-of-commerce works, that provide solutions in certain sectors, for certain kind of works and in certain jurisdictions.¹⁰ These mechanisms do not fully address the extent of the issues faced by CHIs and the project partners believe that the most comprehensive way of dealing with this problem would be the creation of a specific exception that enables making available online audio and audio-related works not commercially available that cannot be licensed by a CMO.¹¹

ii. Enable easier access to rights-holder information held by Collective Management Organisations

The project partners recommend;

4 that collective management organisations provide cultural heritage institutions with comprehensive access to relevant databases that contain information on rightsholders (such as CIS-Net¹²) and open up their repertoire information in line with the obligations established by Art 20 (a) of the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (2014/26/EU).¹³ In addition, CMOs should also be obliged to provide, upon request and availability, up to date information on works which they have formerly represented but which are in the Public Domain.

8 Works no longer commercially available are commonly referred to as “out of commerce” work.

9 Many in-copyright works that have high research value have never been commercially available. Examples include oral histories, unpublished film footage, personal and organisational archives, letters etc.

10 The State and University Library, Denmark, refers to the Nordic ECL model as “an important option that we cannot do without.”

11 The BnF expresses reservations about this recommendation because at the date of the drafting of the present report, the French Ministry of Culture does not support the creation of new exceptions in the European Copyright Law.

12 More in CIS-NET: <http://www.cisac.org/What-We-Do/Information-Services/CIS-Net>

13 View the entire directive at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A32014L0026>.

5 that the European Commission establish a comprehensive, publicly accessible, register of European collective management organisations, independent management organisations and major rightsholders which includes information on the subject matter, rights and ownership that they cover.

iii. Improve online access to audio and audio-related heritage with clear guidance on other legal or nonlegal factors

The project partners recommend;

6 the development of clear European guidelines, expanding the Europeana Publishing Framework¹⁴, for cultural heritage institutions to help them act responsibly when putting works online that contain ethically or culturally sensitive content.

7 that the European Commission provide a mechanism to balance the relationship between data protection legislation, privacy laws and the mission of cultural heritage institutions to make works in their collections available to the public.

14 The Europeana Publishing framework: <http://pro.europeana.eu/publication/publishing-framework>.



The
3 MUSICAL WILKY'S

The three musical Wilky's, musical electric fantastics, Circus Museum, CC BY-SA

MUSICAL
ELECTRIC
FANTASTICS

1. Update The European Copyright and Related Rights Legal Framework

European cultural heritage represents who we, as European people, are and where we have come from, as well as helping shape our future. It is essential that these rich works are preserved and made available for European citizens. To fulfill these aims, CHIs have a mission to collect, preserve and make publicly available works which represent Europe's cultural heritage. This includes making the important audio and audio-related works available online as part of the Europeana Sounds project.

A proportion of collections of European CHIs can be accessed by the public online. However, the majority of these institutions' collections are invisible. This is partly caused by complexities in clearing rights to provide access to in-copyright works which is time consuming, expensive, and does not always result in being able to locate or trace the copyright holder. There are also collections containing in-copyright, works that were never created with any commercial intent. e.g. Interviews, oral histories, recordings of public events etc. As a result, these never-in-commerce collections are very difficult to make available online, since contacting rightsholders directly is often necessary. Differences in national copyright laws or licensing practice can also result in the dissemination of works being restricted to national audiences or within closed networks and only accessible to registered users e.g. for educational uses, or geo-blocked to only one member state.

Other factors that explain the online absence of a lot of European audio heritage includes the prioritisation of what can be digitised and preserved, as well as the issue of how best to allocate budgets and resources. In this chapter the project partners will argue that we need an update to the European Copyright and Related Rights Legal Framework in terms of the existing exception for reproduction rights, and a specific exception that enables making audio and audio-related works available online which are not commercially available and cannot be licensed by a CMO.

Reproduction Rights

Copyright law permits CHIs to digitise and provide access to (part of) their collections within the premises of the institutions. These exceptions and limitations to copyright were optional for implementation in the Information Society Directive; hence this implementation differs per member state.

Institutions in member states that have implemented art 5(2)c¹⁵ of the Information Society Directive in national legislation can digitise (some) works under 'specific acts of reproduction' without prior permission from rightsholders. This is currently the case in all 28 member states¹⁶ The Information Society Directive reads:

'(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage'

The fact that the Information Society Directive allows 'specific acts of reproduction' without explaining what these acts are has led to a situation where this exception has been implemented in very different ways across member states. While some member states have applied relatively strict criteria (such as exceptions that only allow reproduction for the purpose of preservation) others have given CHIs more freedom.¹⁷ From our perspective this degree of variation is undesirable, as it does not provide a level playing field for institutions across Europe. The Dutch exception, for example, allows for reproduction in favour of preservation purposes, such as 'For retention of a reproduction of the work for the institution, if the specimen is threatening to fall into disrepair.' The United Kingdom has a different implementation of 5(2)c and as a result reproduction is only permitted by CHIs where it is not reasonably practicable to purchase a copy of the item to fulfill the purpose. In Greece another differing implementation of the exception only allows for one copy to be made.¹⁸

Additionally, CHIs need to be able to make reproductions of their collections in other contexts than just preservation. Examples of this include making copies of items when seeking quotes for insurance, before lending an item for exhibition, or before export to another country for the purposes of a temporary loan. Many countries also have exceptions to the reproduction right that allow copies to be made for individual researchers, such as the user of a library where they cannot make the copy themselves but require the librarian to do this for them.

The differences in the ways that Member States have implemented the reproduction exception 5(2)c has a direct impact on European citizens, whose access to culture is now governed by the Member State in which they reside.

15 This exception does not allow CHIs to make these reproductions available online. Information Society Directive 2001/29: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

16 De Wolff and Partners (2013) *Study on the application of directive 2001/29/EC on copyright and related rights in the information society*: http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

17 For example the requirement to check the availability of the work for purchase before being allowed to make a copy for preservation is more rigid in Estonia than in Ireland or Britain. Cf. WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives, presented by Kenneth Crews in 2008, p. 54-57 (PDF: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf).

18 See Kenneth Crews, study on copyright limitations and exceptions for libraries and archives (WIPO, 2008) http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf.

As the examples above show the language of the Information Society Directive is not broad enough for European institutions to digitise their entire collections freely for the purposes that they require for the day to day running of their organisation. As cultural heritage institutions seek legal certainty when making reproductions and digitising their collections, the project partners therefore recommend:

Recommendation 1: that the European legislator updates Art 5(2)c of the Information Society Directive (2001/29/EU) to allow all acts of reproduction of in-copy-right works in the collections of beneficiary institutions for all non-commercial purposes related to their public-interest mission, and to make this exception mandatory for all Member States¹⁹.

Another exception that facilitates access, is Art 5(3)n²⁰ of the Information Society Directive which allows CHIs to make their collections publicly available via dedicated terminals on the premises of the establishment. It has been implemented in 19 of the 28 member states.²¹ The exception states:

'(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections'

The exception supports CHIs in providing access to cultural heritage on dedicated terminals within the institution buildings. However, institutions strongly feel that they are not fully able to fulfil their role as guardians of European heritage based on the restriction to dedicated terminals. In this context, limiting access to works on-site is seen as discriminatory as it only benefits those who know that the audio and audio-related heritage is located in a particular institution and to those who have the funds or ability to travel to the premises. In summary, CHIs need other solutions in order to make European heritage widely available to its citizens.

19 The Bibliothèque nationale de France (BnF) expresses reservations on this recommendation because at the date of the drafting of the present report, the French Ministry of Culture is not in favour of making mandatory the implementation of the exceptions existing in the Directive 2001/29/EC.

20 Information Society Directive 2001/29: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

21 De Wolff and Partners (2013) Study on the application of directive 2001/29/EC on copyright and related rights in the information society: http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

The project partners recognise that securing a licence agreement from rights-holders or their representatives is standard practice for obtaining permission for the online publication of in-copyright commercially produced works. However, for mass digitisation it is not always possible or practical to identify or contact each and every rightsholder. For audio and audio-related works, a number of people may own copyright. These rightsholders may include composers, musicians, the person or organisation that made the sound recording, producers and publishers. Historically, information on who owns the copyright in a particular element of the audio and audio-related works has not always been clearly recorded. This puts a lot of pressure on CHIs to try and complete the rights information, often with very little evidence to help start the due diligence search. This becomes particularly acute when dealing with historical material.

Where a relatively modern CD will have information booklets containing rights information, this practice has varied over time. Covers of LP's, cassettes and other audio-carriers have not always been kept safe over the decades, leaving the CHIs only the actual sound on the recording and minimal metadata to work with when tracing rightsholders. Unpublished music or broadcast material will also not have any standard form of information accompanying the recording. In fact, it may have no accompanying written information at all.

The Orphan Works Directive²² is a legal measure that sets out common rules on the digitisation and online display of orphan works. It provides CHIs with the possibility, after a due diligence search and registration in the EUIPO-database²³, to make works available online for non-commercial purposes if the rightsholders cannot be located or is unidentified. However, it does not provide a solution for all the challenges CHIs face. CHIs are required to undertake a due diligence search for each rightsholder of every work that they wish to digitise and make available, a time-consuming process that severely limits its applicability to mass digitisation. As research based on the implementation of the directive has shown in the UK, The Netherlands and Italy²⁴, practical benefits of using the Directive to mass digitise is limited because of the time-investment needed in searching for each and every rightsholder before making the collection available online.

The current exceptions in the Information Society Directive (5(2)c and 5(3)n) do not relate to the online publication of audio heritage. Furthermore, the current terms of the Orphan Works Directive are too onerous to be applied to large scale digitisation. As practical experience shows, other solutions are required. There are now solutions being tested throughout Europe to make out-of-commerce works available, namely the national approaches in France

22 Orphan Works Directive 2012/29/EU: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>.

23 Previously known as OHIM, for database see: <https://oami.europa.eu/ohimportal/nl/web/observatory/orphan-works-database>.

24 As the EndoW due diligence research in the UK, The Netherlands and Italy shows: <http://diligent-search.eu/2016/02/09/endow-research-backs-up-the-overly-burdensome-nature-of-the-diligent-search/>

and Germany, the Memorandum of Understanding and different Extended Collective Licensing models. The next section of this document will examine these approaches in further detail.

Existing solutions for out-of-commerce works

National Approaches: France and Germany

In recent years, both France²⁵ and Germany²⁶ have developed national solutions to the issue of out-of-commerce print works, enabling CHIs to digitise and provide online access to works that are no longer commercially exploited.

While the two models differ there are key aspects that are similar. In both cases, cut-off dates have been defined, limiting the scope of the law to works published before the year 2001 (France) and 1966 (Germany). Also, both countries have opted against a model that requires the search for, or communication with, individual rightsholders. Instead both have created a register to make transparent the works that CHIs plan to make available to the public. Furthermore, both in France and in Germany, rightsholders have the right to opt out at any time. Lastly, there is no geo-lock on the digitised works that are made available online by the beneficiaries, meaning they can be seen by all European citizens.

There are some key differences as well. While both models are licence-based, use of the digitised material in its digital collection is free for French CHIs. In Germany, a licence payment is made to the CMO in the form of a one-off fee per work. A second difference is that in Germany the CHIs who have arranged a licence are allowed to show 100% of the work online, whereas in France only 15% of the individual work is accessible online and 100% in the library premises.

In France, the 20th century black hole can now be diminished greatly by CHIs thanks to a cut-off date that encompasses the whole of the century, even though the works cannot be made accessible by CHIs in their entirety. The German out-of-commerce solution has the advantage of providing long-term access to all works digitised online, while, because of the one-off payment, very importantly still ensuring that CHIs have security in their budget planning.

So far, unfortunately, both solutions are limited to printed works; in France to books, in Germany to books and journals. These laws therefore do not provide online access for audio and audio-related works. Aspects of these models could, however, serve as role models for future EU legislation for print, audio and audiovisual out-of-commerce works.

25 Please find the French legislation here (French): https://www.legifrance.gouv.fr/affichCode.do?jse-sessionid=3D9CA4A178F55DC3882878E424EBFA96.tpdila08v_2?idSectionTA=LEGISCTA000025440389&cidTexte=LEGITEXT000006069414&dateTexte=20160303.

26 Please find the German legislation here (German): <http://www.buzer.de/gesetz/10944/index.htm>



European Approach: Memorandum of Understanding

At the European level, the Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works²⁷ was finalised in 2011, and was the outcome of stakeholder dialogue, including partners of the Europeana Sounds project. It provides a framework to make available books and journals which have previously been published. Four countries have implemented legislation regarding out-of-commerce works: Slovakia, Poland, France and Germany - the characteristics of the latter two are described above. Both models differ however from the MoU in terms of the engagement with rightsholders. Whereas the MoU recommends CHIs to communicate the plan to make the works available online in advance and also recommends the CMOs and rightsholder organisations notify the rightsholders individually, both France and Germany have opted for ensuring transparency by creating a central register in which all works to be made available are made public. This approach makes both national solutions much more practical than the MoU as the focus is on stakeholder awareness and engagement by CMOs, rather than embarking on rightsholder by rightsholder diligent search.

The MoU is a promising first step in developing a solution for making out of commerce works available, however it does not include audio and all audio-related works. It is therefore limited in its scope and cannot be considered a solution to improving online access to sound heritage in Europe as it is.

However, the project partners subscribe to the merits of the MoU in making printed works available, and are interested in its potential application in making sound and audiovisual heritage available, while at the same time underlining the practical merits of the French and German solution. The project partners also believe the principles established by the MOU are highly applicable to the audio sector, given the strong history of collective management of music in certain parts of the EU.

Extended Collective Licensing

The system of collective management organisation (CMO's) exists to administer rights, negotiate contracts and collect money for their members for certain specific uses of their content, which are determined by CMO members and national legislation. For example, in the case of music CMOs some common activities that are undertaken range from the collecting of revenues from organisations that play music on their premises, through to the licensing en masse of music that is played on the radio, or television. In this context the CMOs act as an intermediary to overcome the hurdle of licensees contacting each individual rightsholder directly.

27 Read the full MoU here: http://ec.europa.eu/internal_market/copyright/docs/copyright-in-fso/20110920-mou_en.pdf.

This “one stop shop” role that CMOs can provide is arguably taken to its logical conclusion in the form of extended collective licensing. Extended collective licensing (ECL) creates a legal fiction where CMOs are able to negotiate and provide licences for in-copyright works of creators who are members, as well as non-members, of the collecting society. In this sense they are allowed by law to “extend” their repertoire, beyond the mandate given to them by their registered members to also represent the rights of non-members. In the late 1950s, early 60s all Scandinavian countries implemented such models, as has the Czech Republic, and the UK in 2014. ECL can make negotiations easier because there is only one party to negotiate with, and the licence offered to customers is legally water-tight because the law allows the CMO to represent not just their members but also non-members.

For this specific reason, as identified by the Memorandum of Understanding on Out of Commerce Works and the French and German ECL models discussed above, the project partners believe that ECL occupies an important role in helping sound archives put their collections online.

However, it also needs to be recognised that this role of intermediary, played by a CMO, does not currently always work in practice for the cultural heritage sector across the whole of the EU. Examples of this include the fact that only in a minority of EU countries have ECL models in law, and even where they do, they do not necessarily for a variety of differing reasons allow mass digitisation of audio material by CHIs.²⁸

Heritage is different

The music sector is very active in managing copyright and related rights in musical works in European member states. As a result CMOs are broadly in a position to license modern music for those who want to use it, although it may be the case that not all EU countries have an active CMO for all relevant rights layers. For example, GESAC, which represents literary and musical rights (the “composition”) only has 25 members in the 28 member states, no members being present in Bulgaria, Cyprus or Malta.²⁹ To what extent collecting societies represent unpublished works is unclear, and it is assumed in all likelihood will vary from member state to member state. For example in Romania libraries have been told that CMOs do not represent unpublished sound recordings.

The heritage sector also does not necessarily easily fit in with the current activities of European music CMOs. Very often cultural sector organisations will have to negotiate bespoke licence agreements with CMOs because the

28 The Czech Republic has a specific ECL that does not permit CMOs to offer CHIs licences for making its collections online. Although Extended Collective Licensing was introduced in October 2014, as of April 2016 no CMO has applied to the government to operate an ECL.

29 See GESAC report on best practices in the rights clearing process of copyright protected audio heritage in Europe and on the applicable legal framework in the European Union: http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Sounds/Other%20documents%20related%20to%20the%20project/Europeana%20Sounds%20GESAC%20Report.pdf.

standard agreements that collecting societies offer are developed, for example, for a commercial company offering online services of pop music, and does not meet the requirements of digitisation projects being undertaken by sound archives.

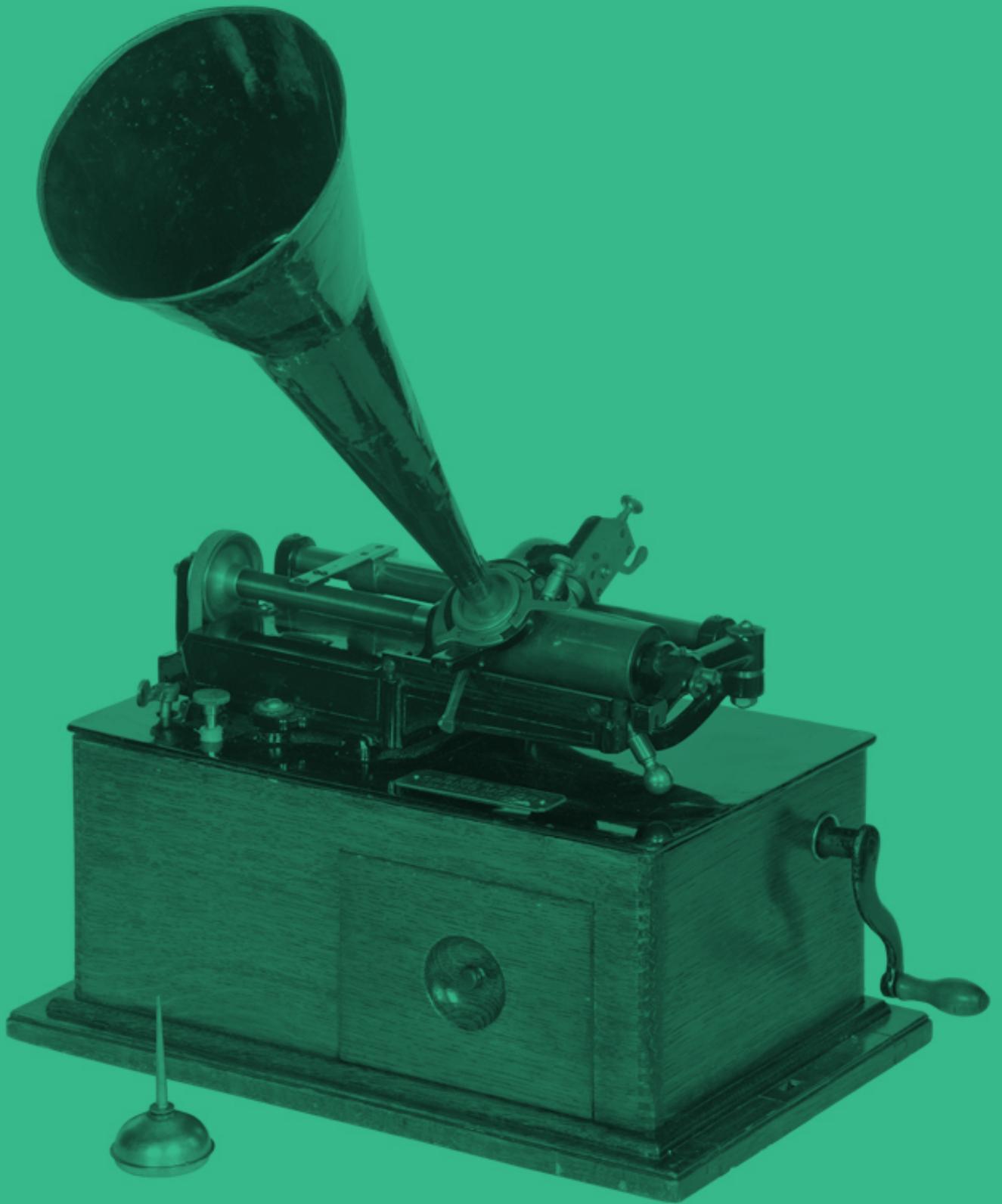
Furthermore, even when a CMO is active in a member state and can provide licences for the rights that were entrusted to them, the heterogeneous nature of heritage works are often different from contemporary published music that is intended for commercial distribution. Heritage can be different because it includes works that were never created for commercial publication and may not even contain music; such as language dialect recordings recorded by a research institute, field recordings that include oral histories of a small village, recordings of environmental sounds and soundscapes of a market town, recordings of public events etc. The categories of such works are potentially almost endless but for these works there is no CMO to contact for permission.

Archives also hold various types of music collections other than published contemporary music; including unpublished works, broadcasts or traditional music. These may contain some music, but it is not easily identifiable as the music is embedded within something else such as a broadcast programme, or it is not the type of music represented by the CMO, such as traditional or folk music.

Uncertainty for long term availability

CHIs are also often faced with the economic uncertainty of existing licensing models, including ECL, in which fees are subject to renegotiation at regular intervals (for example every year, or every three years). CHIs have a public mission to collect, preserve and make their collections available to the public. They are faced with a difficult decision of having to invest public money, or charitable donations from philanthropists, in digitising and making available works, whilst not knowing whether the licensing fees will still be affordable in five or ten years from the digitisation. In the UK CHIs have been told the length that an ECL based licence can be given by a CMO to its customers is limited to the length that it has permission to operate in extended mode. The legislation limits this to 5 years. Given the cost of mass digitisation such a short period of "licence certainty" is unlikely to encourage CHIs to use public funds to digitise its in-copyright audio collections.

Investors in digitisation, such as wealthy donors or grant giving bodies - ranging from the European Commission to educational grant giving bodies - normally expect that money granted to digitisation projects will result in the public having perpetual online access to the work. The project partners are, therefore, conscious of the tension between the terms and obligations of the funding grants and the lack of certainty provided by the licences.



Geo-locking heritage

Territoriality is also an issue: Europeana provides cross border, worldwide wide access, and the collections of large sound archives are also very often international, but the nature of music licensing is territorial. This means that the licences available within ECL-based frameworks are usually limited to access only in the country in which the CHIs negotiates with the CMO. In Denmark, for example, the State and University Library have extended collective licences governing the use of approximately 625,000 radio files and 1,100,000 television files by students, accessed with a personal password. However these recordings may only be accessed within Denmark.

The Bookshelf (Bokhylla.no) initiative from the National Library of Norway has also resulted in geoblocking. The ECL agreement will have made 250,000 books available to the Norwegian public by 2017, as well as national radio programmes which will be made available in the future. However, IP addresses (other than in a few exceptional cases) need to be verified as Norwegian before viewing the works³⁰ and therefore locking the content to Norway.

Integrally linked to the issue of territoriality within the single market is the issue of nationality. A 2015 amendment to the Polish Copyright Act introduces a solution for the mass digitisation of out of commerce works. Due to the national silo approach to copyright within the EU and the unclear legal status of the works of non-members being used across borders, as well as the difficult issue of collecting societies representing foreign authors, the regulation excludes works that have been translated from a foreign language into Polish. The law is also limited to works published for the first time in Poland before 24th May 1994.

History and Distribution of Licensing Fees

Cultural heritage bodies, as part of the cultural ecosystem of any country are keen to support creativity and innovation in many ways. This ranges from preserving and giving access to national culture, working with creators on projects, through to the purchase of licences with the expectation that creators and artists are the prime beneficiary of these taxpayer funded licences. There are many factors that influence the distribution of royalties by CMOs, as well as the capability of CHIs to find individual rightsholders. One important factor is 20th century history.

Slovenia, typical of many countries in Central and Eastern Europe, has had a turbulent 20th century history. At the time of the First World War it was part of the Austro-Hungarian Empire, and over most of the 20th century had a politically complex relationship with bordering states comprising firstly part of the Kingdom of Serbs, Croats and Slovenes, and later becoming part of Yugosla-

30 More information on the Bookshelf project: <http://www.nb.no/English/The-Digital-Library/Collaboration-Projects>.

via, before achieving full independence in 1991. The breakup of Yugoslavia has meant that the tracing and identification of rightholders on mass is a nigh on impossible task.³¹ The main difficulties arise from the break up of the Yugoslavian legal system, resulting in the breaking up and often bankruptcy of publishers, music labels etc who used to formerly operate in in one single market. Tracing historical copyright holders, particularly when organisations are involved is to all intents and purposes no longer possible as the copyrights are “lost” or legally unknowable. Similarly in Romania the dramatic changes where most culture was owned or controlled by the state means that little clear evidence exists as to the ownership of copyright between 1947 and 1989. Given these issues, whether the paying of a licence fee to a CMO (knowing that money cannot be distributed to rightholders) or whether a limitation and exception for non-commercial use by CHIs is more ethically appropriate requires careful consideration.

Differences in European ECL models

It should also be stated that there are many types of extended collective licensing models, ranging from the Nordic and UK models that reflect many of the same features, through to the German and French models, which in some important respects are materially different. The project partners emphasise the pros and cons of these differing models.

The UK model has an emphasis on proving representivity by the CMO to the government, whereas the German model simply presumes that the CMO is representative in law. In the UK, for example, the need and complexity of establishing representivity for the government before being able to operate an extended collective licence has meant that over eighteen months after the introduction of ECL laws in 2014, no collecting society has applied to the government to operate in “extended mode.”

In contrast, the presumptive German ECL model does not require the CMO to prove how it is representative as the law simply assumes that it is. Proving representivity, in relation to the heterogeneous and (depending on the collection) sometimes old and never intended for a commerce nature of the works, is also an important issue that has to date attracted little attention or discussion at the policy level.

The Nordic ECL models offer the possibility to digitise and make available to national users all works published in the 20th century, encompassing most materials from audio to print to audio-visual. CMOs, however, are not obliged to offer a licence and the fees are subject to re-negotiation on a regular basis. Access is also usually geo-locked to that country.

31 Bogataj Jancic Maja, Jerovšek, Shelf, Virag, Luke. *Models of clearing up the copyright to a selected group of works for the digitization and / or posting on dLib.si*. IPI, 2010. View at (Slovenian): <http://www.dlib.si/?URN=URN:NBN:SI:DOC-JOLWOKXE>

In contrast to the Nordic models the German model arguably creates a right for libraries to digitise their historical collections, if the conditions of the legislation are met. This right is, however, limited in scope as it includes only printed material published and excludes the latter part of the 20th century. By contrast, under the Nordic and UK models, whether the CMO decides to offer a licence to a CHI can depend on numerous legislative, environmental, economic and organisational factors.

The project partners are conscious of different traditions and histories of collecting societies in different countries across the EU, as well as the heterogeneous nature of the collections of sound archives of which contemporary music comprises only one subset. In jurisdictions where ECL models are functioning this type of extended licensing scheme should be maintained while simultaneously, alternative models need to be developed where they are not working, or do not exist.³²

Based on experiences with solutions for mass digitisation, such as the described ECL models and national legislations for out-of-commerce works, the project partners recommend:

Recommendation 2: for the European Commission to further investigate whether approaches that give pan-European access for out-of-commerce printed works, such as those adopted by Germany and France, can serve as a model for making available sound and audiovisual heritage.

Recommendation 3: that the European legislator creates a legal mechanism to address the issues of making available online audio and audio-related works no longer commercially available³³, as well as works that have never been in commerce at all.³⁴ The project partners recognise that some efforts have been made to address this, such as national approaches including ECL and national imple-

32 The project partners are only aware of the following EU countries that have some legal starting point for mass digitisation. Whether or not they are in practice working depends on the country: France, Germany, Slovakia, Czech Republic, UK, Finland, Poland, Denmark and Sweden.

33 Works no longer commercially available are commonly referred to as “out of commerce” work.

34 Many in-copyright works that have high research value have never been commercially available. Examples include oral histories, unpublished film footage, personal and organisational archives, letters etc.

mentations of the MOU on out-of-commerce works, that provide solutions in certain sectors, for certain kind of works and in certain jurisdictions.³⁵

These mechanisms do not fully address the extent of the issues faced by CHIs and the project partners believe that the most comprehensive way of dealing with this problem would be the creation of a specific exception that enables making available online audio and audio-related works not commercially available that cannot be licensed by a CMO.³⁶

35 The State and University Library, Denmark, refers to the Nordic ECL model as “an important option that we cannot do without.”

36 The BnF expresses reservations on this recommendation because at the date of the drafting of the present report, the French Ministry of Culture is not in favour of making mandatory the implementation of the exceptions existing in the Directive 2001/29/EC.



Portrait of deputy Max Jellema during an interview in restaurant Chalet Royal by Felix Janssens, Stadsarchief 's-Hertogenbosch, CC BY-SA

2. Enable easier access to rightsholder information held by Collective Management Organisations

Accurate and easily accessible rights information is crucial in helping institutions determine the copyright status of the works in their collections and identify the rightsholders. There is, however, no European publicly accessible database of rights information. While the European Commission funded ARROW³⁷ project started in 2008 to fill this lack of information, in 2016 no public portal or access to the ARROW systems is available. There is a publicly accessible Anglo-American initiative called WATCH³⁸, which is used by European CHIs, but it is not focused towards audio and is in no way complete in terms of authors.

One important source of rights information is the data the CMOs hold on membership, types of rights, rights transfers³⁹, information as to when copyright expires and the work falls into the public domain. CMOs have worked together to create better access to rights information, called CIS-Net⁴⁰ but this, also, is not publically accessible.

In order to lower the barrier for CHIs to engage in the licensing process with CMOs there is a need to improve online access to rights information. The Directive on Collective Management of Copyright and Related Rights, and Multi-territorial licensing of Rights, in Musical Works for Online use in the internal Market (2014/26/EU)⁴¹ that is being implemented by member states this year ensures a higher level of transparency of the membership of CMOs. Article(20)a is especially relevant to facilitate rights clearance practices:

“... Member States shall ensure that, in response to a duly justified request, a collective management organisation makes at least the

37 The ARROW acronym stands for: ‘Accessible Registries of Rights Information and Orphan Works’. For more information on Arrow: <https://www.arrow-net.eu/>.

38 WATCH, run by the Harry Ransom Centre at The University of Texas: <http://norman.hrc.utexas.edu/watch/>.

39 For example, the project partners view the fact that the extension to the term of sound recordings and performances in phonograms, as implemented by 2011/77/EU, does not require the establishment of publicly accessible databases when rights reverts back to artists from music producers as a lost opportunity. A database of reversions could have supported rights clearance and allow businesses and CHIs to contact creators directly resulting in a new life for reverted rights.

40 More information on CIS-Net: <http://www.cisac.org/What-We-Do/Information-Services/CIS-Net>.

41 View the Directive here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026>.

following information available by electronic means and without undue delay to any collective management organisation on whose behalf it manages rights under a representation agreement or to any rightholder or to any user: (a) the works or other subject-matter it represents, the rights it manages, directly or under representation agreements, and the territories covered..."

Many, particularly Western European CMOs are more than a century old, which means that their membership has included composers and authors who died more than 70 years ago. The CMOs can of course no longer manage the works of these authors, because they are in the public domain, but the rights information on these works will most likely still be registered in the CMOs databases. CMOs therefore have valuable information for CHIs when they are in the process of determining the copyright status of the work.

The project partners therefore recommend:

Recommendation 4: That collective management organisations provide cultural heritage institutions with comprehensive access to relevant databases that contain information on rightholders (such as CIS-Net) and open up their repertoire information in line with the obligations established by Art 20 (a) of the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (2014/26/EU). In addition, CMOs should also be obliged to provide, upon request and availability, up to date information on works which they have formerly represented but which are in the Public Domain.

There is currently no reliable register of European collecting societies and hubs that covers all right holders for all sectors and uses. It is not clear under the Directive on Collective Management of Copyright if a comprehensive, continuously updated register will be made available to the public. Such a register would increase the transparency of CMOs, as well as facilitate the process of rights clearance; especially in audio and audio-related works where rights layering increases complexity, with the potential for a number of CMOs to require multiple contacts over a single work. Ideally, such a register would also include contact details as well as information on the works of (large scale right holders) that manage their rights individually. Given that CMOs operate in terms of information in their databases on the basis of written consent

and agreements, data protection law should not prevent much information in these databases from being made publicly available. The project partners therefore recommend:

Recommendation 5: That the European Commission establish a comprehensive, publicly accessible, register of European collective management organisations, independent management organisations and major rights-holders which includes information on the subject matter, rights and ownership that they cover.



Instruments from "The Australian abroad, etc", The British Library, public domain

3. Improve online access to audio and audio-related heritage with clear guidance on other legal or non-legal factors

While copyright constitutes one barrier for achieving broader online access to digitised cultural heritage, during the course of the project the project partners have encountered a number of other legal or similar barriers that should be addressed.

Archives, museums and libraries hold a range of works, published and unpublished, that contain personal data - works which concern identified or identifiable individuals who may or may not still be alive. An example of such a collection is the Invisible Women: Positively Women Oral History Project⁴² that the British Library holds in its collection, but has chosen, for reasons of privacy, not to make available online. Women suffering from HIV/AIDS were interviewed by researchers to speak frankly about their home situation, social structures and work lives.

Another privacy example can be found in the collection of Maison Méditerranéenne des Sciences de l'Homme, where interviews with a renowned violin maker have raised questions within the institution about the ethics of publishing it online. The interviews were carried out by an anthropologist in a research context, meaning more intimate details were shared than the instrument maker might have chosen to make available in a public context.⁴³

Decisions as to when these types of works (containing private and personal information, or opinions of others) can be made available online, needs to be managed in a way that, within reason, avoids the misrepresentation of living people or family members.

Even if the person who is speaking or singing is not alive, making these works available to the public may cause distress to those affected. These issues cover

42 More information about this collection: <http://www.webarchive.org.uk/wayback/archive/20141119025400/http://www.bl.uk/reshelp/findhelprestype/sound/ohist/ohcoll/ohhealth/health.html>.

43 These recordings, known as Enquête ethnologique sur les luthiers de Mirecourt by Hélène Claudot-Hawad can be viewed here: http://www.europeana.eu/portal/record/2059211/dyn_portal_index_seam_page_alo_alold_3774.html.

two distinct, but linked legal instruments; the Data Protection Directive⁴⁴ (and the future Data Protection Regulation⁴⁵) and the European Convention on Human Rights⁴⁶.

The manner in which information ends up in a sound archive varies tremendously: many works in a cultural organisation will be there without the explicit consent of the people featured on an audio recording. Even actively deposited personal information and opinions need to be treated carefully, since everything before the advent of the internet would have been deposited with an expectation that only physical, and therefore relatively limited, access would be possible.

While heritage was disseminated to the public before the rise of the digital age - through broadcasting, research copies and otherwise - the entirely different dynamic of the internet changes the reach of this dissemination (which includes private information) considerably. This potentially creates ethical and legal challenges for the individuals concerned, as well as the institutions themselves. There are also many parallels between the concerns that arise in regards to data protection and privacy law, and the growing body of practice that exists around traditional knowledge⁴⁷.

An example of a collection where cultural sensitivity has played a role in the decision making around how to make it accessible, is the British Library's ethnographic wax cylinder collection that features Australian Aboriginal music recorded between 1898 - 1915.⁴⁸ The music on the recordings is traditionally only passed on to certain members of the Aboriginal communities, such as elders of the village. Since online distribution was not considered when the recordings were originally created in the early 20th century, their publication required a sensitive understanding of the concerns of the communities to ensure the recordings are used with respect, and not used out of context. Many of the privacy issues relate to unpublished works, but they may also hold for historical published works that are re-published many years later when an individual no longer wishes to be publicly associated with their work of many years previously. The laws that provide a right to be forgotten, and have been much discussed since the European Court of Justice case Google Spain v AEPD and Mario Costeja Gonzales⁴⁹, are just one example of the ways in which institutions are increasingly unsure, how to navigate the current wider legal and

44 The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

45 As announced in 2012: <http://ec.europa.eu/justice/data-protection/>.

46 European Convention of Human Rights: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

47 See for example the work WIPO has done on the intersection between traditional knowledge and IPR: http://www.wipo.int/pressroom/en/briefs/tk_ip.html.

48 You can listen to these recordings here: <http://sounds.bl.uk/World-and-traditional-music/Ethno-graphic-wax-cylinders>.

49 ECJ judgement of 13 May 2014: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=363285>.

information law environment, in addition to copyright law.

Those in the cultural sector find themselves in the middle of an uneasy tension established by different legislative frameworks: between copyright, privacy, and data protection laws. Each framework gives very different rights to individuals, and contains different exceptions and limitations for archives and research use. The project partners therefore recommend:

Recommendation 6: the development of clear European guidelines, expanding the Europeana Publishing Framework⁵⁰, for cultural heritage institutions to help them act responsibly when putting works online that contain ethically or culturally sensitive content.

Recommendation 7: that the European Commission provide a mechanism to balance the relationship between data protection legislation, privacy laws and the mission of cultural heritage institutions to make works in their collections available to the public.

50 The Europeana Publishing framework: <http://pro.europeana.eu/publication/publishing-framework>.

