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D3.3 Report from Stakeholder Workshop

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Abstract: This document reports on a Stakeholder Workshop held on 19 March 2015 at the Royal Museum of Art and History in Brussels. The Workshop brought together representatives from rights holder organisations, cultural heritage institutions, civil society and law scholars. The stakeholders considered the three main barriers experienced by Europeana Sounds data providers in making their collections available online. The report outlines the outcomes from the Workshop.

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Statement of originality

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Project summary

Europeana Sounds is Europeana's 'missing' fifth domain aggregator, joining APEX (Archives), EUscreen (television), the Europeana film Gateway (film) and TEL (libraries). It will increase the opportunities for access to and creative re-use of Europeana's audio and audio-related content and will build a sustainable best practice network of stakeholders in the content value chain to aggregate, enrich and share a critical mass of audio that meets the needs of public audiences, the creative industries (notably publishers) and researchers. The consortium of 24 partners will:

- Double the number of audio items accessible through Europeana to over 1 million and improve geographical and thematic coverage by aggregating items with widespread popular appeal such as contemporary and classical music, traditional and folk music, the natural world, oral memory and languages and dialects.

- Add meaningful contextual knowledge and medium-specific metadata to 2 million items in Europeana's audio and audio-related collections, developing techniques for cross-media and cross-collection linking.

- Develop and validate audience specific sound channels and a distributed crowd-sourcing infrastructure for end-users that will improve Europeana's search facility, navigation and user experience. These can then be used for other communities and other media.

- Engage music publishers and rights holders in efforts to make more material accessible online through Europeana by resolving domain constraints and lack of access to commercially unviable (i.e. out-of-commerce) content.

These outcomes will be achieved through a network of leading sound archives working with specialists in audiovisual technology, rights issues, and software development. The network will expand to include other data-providers and mainstream distribution platforms (Historypin, Spotify, SoundCloud) to ensure the widest possible availability of their content.

For more information, visit http://pro.europeana.eu/web/europeana-sounds and http://www.europeanasounds.eu

Copyright notice

Contents

Executive summary: D3.3 Report from Stakeholder Workshop

The work of WP3 (Licensing Guidelines) has been twofold: first, disseminating knowledge, know-how and best practices in rights labelling of audio-(related) works within the Europeana Licensing Framework and secondly, determining which barriers data providers experience in trying to make their collections available online. GESAC has been asked to help solve these barriers to online access, with the assistance of Victoriano Darias (The Napkin Idea) as expert. An interim report by Darias formed the basis for the Stakeholder Workshop held on 19 March 2015 at the Royal Museums of Art and History in Brussels. The Workshop brought together representatives from rights holder organisations, cultural heritage institutions, civil society and law scholars. In this document we report on the discussions and outcomes of the Workshop. This report will form the basis for the policy recommendations work of WP3, which will be carried out together with the Institute for Information Law.

Europeana Sounds data providers experience the most IPR-related issues at the stage of identifying rights holders for their collections. Partners who do not have in-house legal expertise could benefit from information provided by a Collective Management Organisation (CMO). CMOs are often organised on a national level, which could mean that a cultural heritage institute needs to contact the CMO in each EU member state. However, author societies have made significant steps in combining their databases of information into one location, the CIS-NET portal.

The Europeana Sounds project is investigating the barriers to making out-of-commerce works available online. The Europeana MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works is limited to books and journals, and does not apply to musical works or sound recordings. Based on the discussions at the Workshop, we can state that there are a limited number of works represented by author's societies that can be defined as out-of-commerce. However, we have not researched this yet in context with recordings and this will be looked into further with the recording industry (IFPI and IMPALA). Orphan works were also discussed. The OHIM-database holds information on all works that have gone through the due-diligence search process. After a due-diligence search has been performed and recorded, and no rights holder can be located, the work can be made available.

Ideas for working around domain constraints with licensing were also discussed. The discussions considered the Extended Collective Licensing model, which moves from collective rights management being an 'opt in' to being an 'opt out' arrangement. Geo-locked materials were also considered and how this issue is affected by current progress towards cross border licensing. The limitations and constraints of existing licensing structures for cultural heritage organisations were also considered.

The feedback from the rights holder Workshop will be fed into the report from Victoriano Darias, and this will in turn feed into the policy recommendations for Europeana Sounds data providers from WP3.

1 Introduction

Europeana Sounds is Europeana's 'missing' fifth domain aggregator, joining APEX (Archives), EUscreen (television), the Europeana film Gateway (film) and TEL (libraries). It will increase the opportunities for access to and creative re-use of Europeana's audio and audio-related content and will build a sustainable best practice network of stakeholders in the content value chain to aggregate, enrich and share a critical mass of audio that meets the needs of public audiences, the creative industries (notably publishers) and researchers.

The work of WP3 (Licensing Guidelines) has been twofold: first, disseminating knowledge, know-how and best practices in rights labelling of audio-(related) works within the Europeana Licensing Framework[1]. Second, through two surveys and a rights workshop in Copenhagen[2] with our data-providing partners, we have determined which barriers our partners experience in trying to make their collections available online. Broadly, these barriers fall into three categories: trouble in locating and determining rights holders, uncertainty in how to make out-of-commerce works available, and lastly how to deal with geographical limitations in sharing digital objects.

Based on this information we asked GESAC[3] (the umbrella organisation for authors societies in Europe) to help us solve these barriers to online access. Victoriano Darias (The Napkin Idea) is the author of the research as an expert consulted by GESAC. The report is in its final stages and there has been an intermediate report released. This draft formed the basis for the Stakeholder Workshop held on 19 March 2015 at the Royal Museums of Art and History in Brussels.[4]

1.1 Stakeholder Workshop

The Workshop combined representatives from rights holder organisations, cultural heritage institutions, civil society and law scholars. Copyright laws typically grant rights to three types of rights holders. Each type was represented during the Workshop:

- Authors (of their works)
- Performers (of fixations of their performances)
- Phonogram producers (of their phonograms or sound recordings).

The half-day session aimed to be as hands-on and practical as possible, figuring out solutions that could be adopted by all relevant stakeholders. The basis for discussion was the draft research report commissioned by Europeana Sounds.

The organisations that participated in the Workshop were:

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[1] http://pro.europeana.eu/get-involved/europeana-ipr/europeana-licensing-framework
[2] http://www.europeanasounds.eu/news/discussing-our-barriers-to-online-access
[3] http://www.authorsocieties.eu/
[4] Please find the workshop agenda here:
https://docs.google.com/a/kl.nl/document/d/17T3csCh7NHuuHM3N8AFMVc-u8JhUf3QOkf9WxQTEH1s/edit#

- GESAC (Authors and Composers)
- IFPI[5] (International Federation of the Phonographic Industry)
- ICMP[6] (International Confederation of Music Publishers)
- The Napkin Idea[7] (Consultancy for Creative Industries)
- Kennisland[8] (Civil Society, also representing Europeana[9])
- IViR[10] (Institute for Information Law)
- Phonothèque MMSH[11] (Sound Archive)

The Workshop was held under the Chatham House Rules[12], so no quotes are attributed to the participants.

Note that we focused our solutions during this Workshop on those works which have been entrusted to collective management organisations (CMOs) given the expertise at the table. Not all works that will be made available through Europeana Sounds have rights holders (i.e. those works in the public domain), nor do all works have rights holders that are members of CMOs. An example of works that most likely have rights holders who are not members of CMOs is oral history field recordings.

In this document we report on the discussions and outcomes of the Workshop. It is structured narratively by covering the barriers that our Europeana Sounds partners experience: locating rights holders, out-of-commerce works and domain-constrained works. This report will, together with the work done before (D3.1 [REF 1], D3.2 [REF 2]), form the basis for the policy recommendations work of WP3, which will be carried out together with the Institute for Information Law.

2 Locating and determining rights holders

One of the main outcomes of the *Survey on Barriers to Online Access[13]*, completed by our Europeana Sounds partners in October 2014, was that they experience the most IPR-related issues at the stage of determining who the rights holders are in their collections. When or if they determine who the rights holders are, the partners also then experience barriers in locating them to ask for permission to make digital objects available online. These barriers are part of the *transaction costs* of making digital objects available. These are costs incurred which stand separately from possible licensing costs, and can often be much higher than the actual licensing costs. During this first part of the Workshop we discussed how we can lower these costs for cultural heritage institutions.

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[5] http://www.ifpi.org/

[6] http://www.icmp-ciem.org/

[7] http://thenapkinidea.com/indexenglish.html

[8] https://www.kl.nl/en/

[9] http://pro.europeana.eu/

[10] http://www.ivir.nl/

[11] http://phonotheque.mmsh.univ-aix.fr/Main.htm

[12] http://www.chathamhouse.org/about/chatham-house-rule

[13] Find a copy of the survey here:
https://docs.google.com/a/kl.nl/forms/d/1pPgbhQTZy315H9Tz6fWSmvVPSB3uG5wK_nz4hDy-pm8/viewform. The results of the survey were reported in D3.2 *Barriers to online access* [REF 2]

2.1　　　Asking for help

During his research, Victoriano Darias was in contact with most author societies in Europe. Interestingly, he found that some GESAC members had not been contacted yet by any participating data provider, even if they were located in the same territory. This was determined to be a good first step in determining rights holders, as the CMOs (Collective Management Organisations) hold extensive catalogues with rights information. Partners who do not have in-house legal expertise could particularly benefit from the information the CMO can provide.

2.2　　　Database access

CMOs are often organised on a national level, which could mean that a cultural heritage institute needs to contact the CMO in each EU member state before it can take full advantage of the information stored in the catalogues. However, author societies have made significant steps over the past few years to work together in combining their databases of information into one location, the CIS-NET portal. Public access to this database is not possible, due to the privacy of the rights holders stored there, as well as private details concerning the licenses that have already been granted over the years. The local authors' society can access it and help the cultural heritage institution in determining rights holders. Darias will include an appendix in his report including contact information for the author societies in the EU member states, making the threshold for our partners as low as possible.

It was confirmed that the CMOs concerning phonogram rights as well as publisher's rights are also taking steps to combine databases for an easier distribution of information on rights holders. It was also noted that music publishers are members of authors' rights CMOs, where it is allowed and, in some cases, music publishers for print music are members of reprography rights CMOs, which could further streamline the process of clearing rights. We are working with ICMP and IFPI to also include contact information for local representatives of CMOs, so that all layers of rights in audio-works can be cleared as easily as possible.

Another issue that was briefly discussed was whether CMOs could provide partial access to the information in their databases that allows cultural objects to be identified as being in the public domain (or to provide exports of the relevant information). This issue was flagged for follow up outside of the Europeana Sounds project.

3　　Out of commerce works

One of the specific issues the Europeana Sounds project looks into are the barriers in making out-of-commerce works available online. The Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works[14] has been limited to books and journals, which makes it inapplicable to musical works or sound recordings.

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[14] View the MoU here: http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm

3.1   Does 'out of commerce' apply to audio works?

The market for books and audio are vastly different. Perhaps the most applicable difference in this situation is that the online market for audio is much more developed than that of books, as is digital consumption of audio. This means that it is more likely that a book is not available through *customary channels of commerce* (i.e. no longer in print) than a musical work which, once fixated on a phonogram, can be played online in many different contexts (through platforms such as Spotify or in a bar). Since it comes at virtually no cost for rights holders to make audio available online (as opposed to printing CDs or Vinyl) most musical works are available and cannot therefore be deemed to be out Out-of-Commerce.

However, does this also hold in a heritage context? In order to make musical works available online you need to have a digital file of the music. While much of the music made available over the last century or so was kept carefully by publishers, a lot has also been scattered and lost in the turmoil of the 20th Century. It is very likely that cultural heritage institutions hold musical works (digitised or not, fixated on a phonogram or not) that are not in the repertoire of publishers and other rights holders. This may be because it was thought lost, was part of the repertoire of publishers that went out of business, or for some other reason. However, it was argued during the Workshop that these works would perhaps fall under the Orphan Works category, and not under the out-of-commerce works.

Based on this we can state that there are a limited number of works represented by author's societies that can be defined as out-of-commerce. However, we have not researched this yet in context with recordings. This is something that needs to be looked in further with the recording industry (IFPI and IMPALA).

3.2   Orphan works

Orphan works[15] are defined in Directive 2012/28/EU which is being implemented in national jurisdictions in the EU. Orphan works are works such as books, newspapers and magazine articles and films that are still protected by copyright but whose authors or other rights holders are not known or cannot be located or contacted to obtain copyright permissions. Orphan works are part of the collections held by many European libraries, which might remain inaccessible without common rules to make their digitisation and online display legally possible. After a due-diligence search has been performed and recorded, and no rights holder can be located, the work can be made available. The privileges that come with the Orphan works status only apply to cultural heritage organisations, which would not be an issue for our Europeana Sounds partners.

The OHIM-database[16] that holds information on all works that have gone through the due-diligence search process was launched late 2014 and holds 80 works as of March 2015. It is hoped and expected that this number will grow substantially over the next few years, making more works available online.

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[15] Read more on Orphan Works here:
http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm
[16] Read more on the OHIM Orphan Works Database here:
https://oami.europa.eu/ohimportal/nl/web/observatory/orphan-works-database

3.3   Finding rights holders

Success in rights clearance all traces back to finding and locating rights holders. We assume that once a rights holder of a work has been found, the corresponding CMO will make it available through their repertoire (and it can therefore be licensed). If a rights holder *cannot* be found we can consider the work to be an Orphan work, which means it can be made available by Europeana Sounds once it is in the OHIM-database. It does not seem to make sense to investigate expanding the current Memorandum of Understanding to include out-of-commerce musical works further (or some other form of making out-of-commerce musical works available).

We have researched this in the context of musical works, but not whether this holds true for the layer of rights in the recording. This needs to be looked into further.

4   Working around domain constraints with licensing

CMOs can only license works that have been entrusted with them in their repertoire. While CMOs hold extensive repertoires of musical works, there are several use cases for when a CMO is not in the position to license material that will be made available through the Europeana Sounds project. The most likely use case in this situation is when the rights holders are not a member of a CMO. This type of rights holders would not have joined a local CMO, since there was no intention to license the material. However, they are still rights holders and their permission is needed for use of their creative works.

Since locating this type of rights holders can be particularly difficult, it is increasingly problematic to make these types of objects available. If no information on rights holders (and permissions already given) has been collected and successfully kept over time by the institution itself, the works are simply locked up until IPR protection has expired.

Most of the Europeana Sounds data providers have kept careful records of the people who recorded the material, but agreements were often made with rights holders before online use was considered to be necessary. This leaves painstaking work in locating rights holders from decades ago.

A possible solution for this barrier, together with the barrier discussed above - determining rights holders and locating them (even if the rights were entrusted with a CMO) - is Extended Collective Licensing.

4.1   ECL model

Extended Collective Licensing[17] (ECL) moves collective rights management from being an 'opt in' to being an 'opt out.' In traditional rights management, a rights holder needs to actively become a member of a CMO, entrusting them with granting non-exclusive licenses for his or her work and receiving royalty payment in return. With ECL, the CMOs can license all creative works within their jurisdiction, under certain conditions. Rights holders can opt-out of this system as they wish.

This system was first introduced in Scandinavian countries in the sixties, and is gaining traction in other European countries in the past years. We will not go into all the advantages and disadvantages of ECL in this document, since it is beyond the scope of the project. This issue has been looked at in more detail in the Europeana Awareness[18] project[19]. We will here focus in on one specific barrier that Europeana Sounds data providers experience: geo-locking of material, also referred to as domain constrained works.

4.2   Cross-border licensing

The advantage of being able to license all the material that you want to make available online through ECL comes at a cost: it can only be made available in the specific jurisdiction where the ECL is in place. Our Danish Europeana Sounds data provider is facing this restriction in trying to make their digital objects available through Europeana: they need blanket European-wide licenses, which cannot be arranged for all of their material, since the other EU countries do not have ECL implemented in their legislation.

CMOs are working together more and more to make cross-border licensing easier for cultural heritage institutions (and other users). The CMOs that comply with specific rules set out in the Collective Management Directive are allowed to license material for online use in several jurisdictions, which means that contacting one CMO per layer of rights in audio-works can be enough to clear rights for online use.

However, CMOs are limited in this approach by a further complication over and above the Collective Management Directive: the arrangements made by individual rights holders with local CMOs (i.e. different arrangement made per territory). This can make cross-border licensing complicated for CMOs.

The research report to be written by Victoriano Darias will include a step-by-step process that can be followed by our Europeana Sounds data providers to make cross-border licensing as easy as possible.

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[17] For an introduction into ECL, please refer to this Wikipedia article:
https://en.wikipedia.org/wiki/Extended_collective_licensing
[18] http://pro.europeana.eu/web/europeana-awareness
[19] See D5.4 of Europeana Awareness, written by Lucie Guibault:
http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Awareness/Deliverables/EA%20D5_4%20EAwareness%20ECLcross-border.pdf

4.3 Licensing structures

Up until this point we have discussed how we can obtain the necessary information on rights to license the heritage that the Europeana Sounds data providers are trying to make available. Very few of our data providers have reached the stage where they can actually enter licensing agreements with CMOs.

During the Workshop we explored why this could be the case, apart from the obvious difficulties in locating rights holders in the first place. One of the possible explanations presented was the lack of communication between the parties on the details of licensing structures, and a misunderstanding of the possible costs of licensing.

It was emphasised that there is much flexibility in licensing structures. In some countries there might be no structures explicitly developed for cultural heritage institutions at this time, but some blanket licensing schemes are already in place and are used, for example, by the British Library. The Europeana Sounds partners were encouraged to start the conversation on licenses with their local CMO.

A second possible explanation for the hesitation of our data providers to engage in licensing was the necessity to measure the use of the licensed material. Licensing schemes are often based on a number of plays/downloads of the material per an amount of time. This is a measurement capability most commercial platforms have readily available (radio stations, streaming services such as Spotify[20]) but is not something many websites for cultural heritage institutions are geared towards.

We would recommend that (future) licenses geared at cultural heritage institutions need to take into account this inability of cultural heritage institutions to provide detailed usage information. It might however be part of the legal obligations that CMOs have (to report on the use of the material). This is something that needs to be looked at further.

5 Next steps

Clear next steps were formulated towards the end of the Workshop. We list them here briefly:

- Victoriano Darias will take the input from the Workshop and adapt the draft report based on the feedback.
- We will expand the report (either in the final version of the research or separately) to contain important contact information with regard to the publishers for the benefit of Europeana Sounds data providers.
- We will follow up with GESAC, ICMP, IFPI and IViR with regard to the next stage of the Work Package: the policy recommendations for our Europeana Sounds data providers and beyond. This can include the additional research mentioned in the text above, or other forms of collaboration.

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[20] https://www.spotify.com/

6   References

Ref 1	D3.1 Guidelines for contributing audio content into Europeana
	http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Sounds/Deliverables/EuropeanaSounds-D1.2%20D3.1-Rights-labelling-guidelines_Guidelines-for-contributing-audio-content-into-Europeana-v1.1.pdf
Ref 2	D3.2 Summary report on barriers to online access to out of commerce works and domain-constrained audio works
	http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Sounds/Deliverables/EuropeanaSounds-D3.2-Summary-Report-on-barriers-to-online-accessv2.0.pdf

Appendix A: Terminology

A project glossary is provided at: http://pro.europeana.eu/web/guest/glossary.

Additional terms are defined below:

Term	Definition
AB	Advisory Board
APEX	Archives Portal Europe network of excellence
CMO	Collective Management Organisation
EC-GA	Grant Agreement (including Annex I, the Description of Work) signed with the European Commission
ECL	Extended Collective Licensing
GA	General Assembly
PC	Project Coordinator
PI	Performance Indicator
PMB	Project Management Board
TEL	The European Library
UAP	User Advisory Panel
WP	Work Package