



Advising the Creative Industries
on Legal & Business Matters

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

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THE NAPKIN IDEA – This report was written by Victoriano Darias at The Napkin Idea
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1. Introduction

1.1 About Europeana Sounds and GESAC's Involvement

Europeana is an Internet portal that acts as an interface to millions of books, paintings, films, museum objects and archival records that have been digitised throughout Europe by the more than 2000 participating institutions, notably cultural heritage organisations such as libraries, museums, archives and audiovisual collections.

Co-funded by the European Commission, Europeana Sounds intends to become Europeana's leg for sound and music heritage.¹

Through the Europeana portal, a variety of European institutions, including the British Library, the Deutsche Nationalbibliothek, or the Irish Traditional Music Archive, want to make their musical and non-musical sound recordings, as well as other music-related resources available to the entire European public.

How does Europeana work?

The way Europeana works in practice is as follows: participating institutions digitise their own content, store it on their servers and make it available through their own websites. Metadata of the content is then made available on Europeana's website, but the content is never stored on Europeana's server nor made directly available by Europeana. Through Europeana, the user is in fact just accessing the content stored and made available by the participating institutions.

The only exceptions are the snippets of content, which are made available through Europeana's website. These snippets are also stored on Europeana's servers.

What is GESAC?

Created in 1990, GESAC groups 34 of the largest authors' societies in the European Union, Norway and Switzerland.

It represents nearly 800,000 authors, music publishers and other rights holders in the areas of music, graphic and plastic arts, literary and dramatic works, and the audiovisual field.

GESAC's head office is in Brussels.

This presents a number of copyright challenges. That is why the Europeana Sounds project includes a phase of rights holder consultation.

Kennisland, as the representative of the Europeana Sounds Consortium, contacted the European Grouping of Societies of Authors and Composers (GESAC) to request the input of authors' societies as regards the identified copyright challenges.

It was agreed that GESAC would provide information on best practices in rights clearing practices for copyright-protected audio heritage content in Europe, including existing licencing structures of authors' societies, as well as on applicable legal frameworks in the EU, to the extent that they concern musical works embedded in such audio material.

The specific research questions and outputs that the Europeana Sounds consortium wished to be addressed by GESAC were as follows:

¹ <http://www.europeanasonsounds.eu/>

- *How can we help Cultural Heritage Institutions with audio collections navigate from a Digital Object with copyright protection through locating and contacting collective rights management organisations (authors' societies) to clear rights in musical works in order to make them available online?*
- *Can we identify best practices, in the form of existing licencing structures and appropriate legal frameworks, that will help Cultural Heritage Institutions with audio material in their collections overcome the obstacles identified by them in the survey undertaken by Kennisland during the T3.2 phase of the project (see point 1.2 below for more information), such as the making of out-of-commerce and domain constrained works available to the European or even the worldwide public, and if so, under which conditions?*

In order to provide assistance, GESAC appointed Victoriano Darias at The Napkin Idea as its external consultant, who has been in charge of coordinating the work.

This report is the result of this work.

Please note, that although there are references to other rights holders, this report only reflects the views of GESAC and its scope is limited to the rights of musical works managed by its member societies.

Rights managed by other rights holders, notably those managed by phonogram producers, are excluded from the scope of this report.

1.2 The Process

In autumn 2014, Kennisland conducted a survey on barriers to the development of the Europeana Sounds project. 16 institutions participated in the survey and commented on their experiences to date in trying to make the content available.

A summary of the survey, which covers both copyright and non-copyright related issues, is available at:

<http://pro.europeana.eu/documents/2011409/d7a12e98-0cc3-45af-8a39-a1c244c199e3>

The summary divides the identified issues into four categories:

- Copyright issues in the online publication of the audio material;
- Out-of-commerce works;
- Domain constrained works; and
- Moral and ethical rights.²

Taking into account the information provided by the document, GESAC conducted a second survey amongst its members. This survey allowed GESAC members to express their views on the identified copyright-related issues to the extent that they relate to musical works. This paper reflects those views.

² It should be pointed out that the term *moral rights*, as used by Kennisland in the Summary Report of the survey, does not have the same meaning as non-economic rights as defined in the Berne Convention and a number of national copyright laws.

1.3 Ownership of the Report's Copyright and Terms of Use

This report was commissioned by GESAC and written by Victoriano Darias at The Napkin Idea. The copyright of the report therefore belongs to GESAC. Under the terms of its agreement with Kennisland, GESAC makes the report, **excluding ANNEXES I and II**, public under a [Creative Commons Attribution 4.0 license](#).

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2. The Copyright Status of the Content to Be Made Available Through Europeana

From the responses to the survey conducted by Kennisland as well as its Summary Report, it appears that the vast majority of respondents are already quite familiar with copyright matters and are therefore already quite advanced in the rights clearance process of the musical works included in their catalogues.

However, it is considered appropriate to include in this report an explanatory chapter on these matters that could be of assistance to current and future participating institutions with varying degrees of familiarity with copyright and its management.

2.1 What Rights Need to Be Cleared and with Whom?

The Europeana Sounds participating institutions want to make available a variety of content, which can be classified into the following categories:

- Musical phonograms fixed on any medium (wax, shellac and vinyl recordings, CD's, digital files, etc.)
- Non-musical phonograms (such as speeches and sound recordings in various spoken languages);
- Sheet music/scores (including manuscripts (autographs), printed lyrics, and interactive scores);
- Images (booklets of records, covers, pictures, etc.); and
- Music related videos.

It seems appropriate to start with an analysis of the rights that would have to be cleared for each type of content, and who those rights would be cleared with. Let's begin with the identification of the rights holders.

It should be noted that Copyright is a subject that is harmonised to a great extent. This means that the EU Directives on the matter have been implemented into the national legislation of the EU Member States, making their main elements uniform throughout the European Union.

(a) Categories of Rights Holders

There are three types of rights holders that the law grants rights to:

- Authors of their works;
- Performers, of fixations of their performances; and
- Phonogram producers, of their phonograms.

In the field of music, the author would be the person (or persons) who writes a musical work – i.e. a composition with or without lyrics. There can therefore be different types of authors: composers, lyricists, songwriters, arrangers, etc.

The performers, who are sometimes referred to as the artists, would be the musicians and singers who perform those musical works.³

An example that may better illustrate the difference between an author and a performer is the 1990's recording of a cover of Bob Dylan's *Knockin' on Heaven's Door* by rock band Guns n' Roses. In this case, the members of Guns n' Roses were the performers and Bob Dylan the author of the song, each of whom held separate rights with respect to copyright.

Sometimes, however, the performer and the author are the same person, like in the case of a singer-songwriter. Once again, Bob Dylan is a good example, since he has recorded many albums in which he performs his own songs. In these instances, Bob Dylan is both the author and the performer, holding both the author's and performer's rights for the two different subject matters – the musical work and its performance.

As indicated above, there is a third player: the phonogram producer.

The phonogram producer can be defined as “*the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds.*”⁴ In this context a fixation would be “*the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.*”⁵

It's that fixation of the sounds of a performance (or of other sounds) that we call a phonogram,⁶ which is a technical term for a sound recording. Note that it is irrelevant if the phonogram is fixed on a tangible medium such as a CD or digital file.

When those sounds are music, the phonogram producer is usually a record label. However, it is not uncommon, especially nowadays, for the phonogram producer and the performer to be the same person. That would happen when the artist decides to record and release his or her recordings by him or herself, without the aid of a record label.

Note that it is common to divide these three categories of rights holders in two. On the one hand, we would have the holder of authors' rights, also referred to as publishing rights or core copyright, which would be those initially granted to the author, and on the other hand, we would have the holders of neighbouring or related rights, which would be those granted to the performer and the phonogram producer.

(b) Types of Rights

We indicated in the previous point that authors, performers and phonogram producers are granted certain rights under copyright law. These rights vary depending on the type of rights holder. The bundle of rights granted to authors, for example, is larger than that granted to performers and phonogram producers. Also, those rights may vary from country to country. However, most rights, notably those

³ A more detailed definition can be found in art. 2 of the WIPO Performances and Phonograms Treaty (WPPT): “*Performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.*”

⁴ Art. 2 of the WPPT.

⁵ Art. 2 of the WPPT.

⁶ Note that the WPPT excludes any “*fixation incorporated in a cinematographic or other audiovisual work*” from the definition of phonogram.

having an impact on the Internal Market (and thus being the rights relevant to the Europeana Sounds project), have been harmonised to a great extent.⁷ Additionally, those that have an impact on the Europeana Sounds project are the same for authors, performers and phonogram producers, namely the reproduction right and the making available right, also called the online rights.⁸

The *reproduction right* allows the right holder – author, performer or phonogram producer – to exclusively authorise or prohibit the making of copies of its subject matter (the musical work, the performance or the phonogram). That would include the digitisation, storage on a server or download of content by a user of an online service.

The *making available right*, on the other hand, allows the right holder – author, performer or phonogram producer – to exclusively authorise or prohibit the making available to the public of specific subject matter (musical work, the performance or the phonogram) in such a way that members of the public may access it from a place and at a time as chosen by them.⁹

With respect to the exercise of these two rights, it should be noted:

- One exploitation may require the clearance of both rights (e.g.: the reproduction right and the making available right);
- The use of one single phonogram may require the clearance of rights as regards the phonogram itself, but also as regards the embedded musical work and performance. This, in turn, may require dealing with more than one right holder; and
- These two rights can sometimes be referred to as mechanical rights (reproduction) and performing rights (making available).

These two exclusive rights are not the only ones granted to authors, performers and phonogram producers. Other rights, albeit irrelevant for the Europeana Sounds project, may also be part of the bundle of rights.

Additionally, authors, but especially performers and phonogram producers, may be granted remuneration rights for certain exploitations. The difference between remuneration and exclusive rights is that with the former the right holder does not have the right to authorise or prohibit the specific exploitations. However, it is entitled to be paid equitable remuneration. This is true, for example as regards performers and phonogram producers in relation to broadcasting and other forms of communication to the public of phonograms.

In general, these remuneration rights do not affect the Europeana Sounds project. There is, however, one very specific case, which is mentioned in point 2.1(e) below, in which the application of such a remuneration right would need to be analysed.

⁷ Although a number of Directives on Copyright issues have been adopted by the EU, the most important one would be Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, commonly known as the Copyright in the Information Society Directive.

⁸ Art. 3 (n) of the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (the Collective Management Directive).

⁹ Note that, as regards authors (but not performers or phonogram producers), the making available right is considered to be part of a wider right of communication to the public.

(c) Exceptions and Limitations to the Reproduction and the Making Available Rights

Copyright laws include exceptions and limitations to the exercise of exclusive rights. Those exceptions and limitations were to a certain extent also harmonized at EU level by the Copyright in the Information Society Directive. The Directive introduced an optional but exhaustive list of exceptions that the Member States were allowed (but not obliged) to include in their legislation.

Two of these exceptions would allow publicly accessible libraries, educational establishments or museums, or archives, to make specific acts of reproduction, which are not for direct or indirect economic or commercial advantage, without the authorisation of the right holders.¹⁰ Additionally, such facilities would also be allowed to make copyright protected content contained in their collections available to the public without authorisation from the rights holders.

However, the Europeana Sounds participating institutions would not be able to benefit from these exceptions to make their content available without a licence, due to their limited scope. Reproductions made in the context of on-line delivery of copyright protected content would be excluded from this exception.¹¹ Furthermore, the making available of works referred to in the previous paragraph would have to take place through dedicated terminals located on premises of the institutions themselves.¹²

An exception that the participating institutions could rely on is that introduced by the Directive 2012/28/EU on certain permitted uses of orphan works (the Orphan Works Directive).

A Europeana Sounds participating institution would be able to use certain musical works and/or phonograms contained in its collection if they are deemed to be orphan, i.e. if the owner of that musical work and/or phonogram cannot be identified or located after a diligent search.¹³

Point 3.2(a) below develops the details of this exception in further detail.

(d) Term of Protection

The aforementioned rights are not granted to a rights holder forever. The protection is only granted for a limited period of time, which varies depending on the type of rights holder.

The term of protection for authors is throughout their lifetime plus **70 years** after their death irrespective of the date of publication.¹⁴

The term of protection of neighbouring rights (performers and phonogram producers) has been extended from 50 to **70 years**. This term is to be calculated on a case-by-case basis from the date of the performance, the publication or communication of its fixation.¹⁵

¹⁰ Art. 5.2.(c) of the Infosoc Directive.

¹¹ Recital 40 of the Infosoc Directive.

¹² Art. 5.3.(n) of the Infosoc Directive.

¹³ The procedure is subject to certain conditions determined by the Orphan Works Directive. Note that there are limitations as to which works and phonograms the Directive is applicable to. All of these issues are developed further in 3.2(a).

¹⁴ Art. 1.1 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), also known as the Term of Protection Directive. Note that specific rules apply to anonymous, pseudonymous, collective and co-written works.

¹⁵ Art. 3 of the Term of Protection Directive as amended by Directive 2011/77.

Once the term of protection has expired, the content enters the public domain and can be freely used without the need to obtain authorisation from the former rights holders.

However, if either the musical work or the phonogram (or both) were still under copyright protection, as in the following examples, a license would be required:

	License for the Musical Work	License for the Phonogram
2012 Recording of a Mozart Piece	No	Yes
1930 Recording of Son House's ¹⁶ " <i>Walking Blues</i> "	Yes	No
1908 Recording of Enrico Caruso singing Verdi's ¹⁷ " <i>La Donna è Mobile (Rigoletto)</i> "	No	No

(e) Management of Music Rights: Neighbouring Rights

Irrespective of who might own the rights to the musical work or the phonogram of a performance initially, those rights can be transferred or their management entrusted to a third party. In fact, this is quite a common occurrence in the music industry.

Given that a big part of the content made available by the Europeana Sounds participating institutions are musical phonograms, it is therefore important to analyse how the rights of authors, performers and phonogram producers are usually managed in this area.

The management of these rights is, in fact, divided in two. On the one hand, we have the management of rights of the musical work (publishing/authors' rights). On the other hand, we have the management of the rights of the phonogram of a performance (neighbouring rights). Let's start with the management of the latter.

As indicated above, the neighbouring rights holders in a musical recording are two: the performer and the phonogram producer.

Typically, when the performer signs a record deal, he or she transfers or assigns his or her exclusive rights to the phonogram producer (the record label). That would include the reproduction and the making available rights of the recorded performance, which, as indicated above are the relevant rights in the context of Europeana Sounds.

Note that, even if the performer and the author of the musical work are the same person, this transfer of rights is limited to the performance. The rights ownership of the musical work is not affected by the record deal.¹⁸

¹⁶ Son House died in 1988.

¹⁷ Giuseppe Verdi died in 1901.

¹⁸ In recent times new types of deals and assignment of rights have become increasingly common. However, it is extremely unlikely that any such practice would be applicable in this case.

The performer's exclusive rights will be transferred or assigned to the phonogram producer for the whole term of protection. These exclusive rights, both of the performer and of the phonogram producer, will therefore be typically held by the record label.

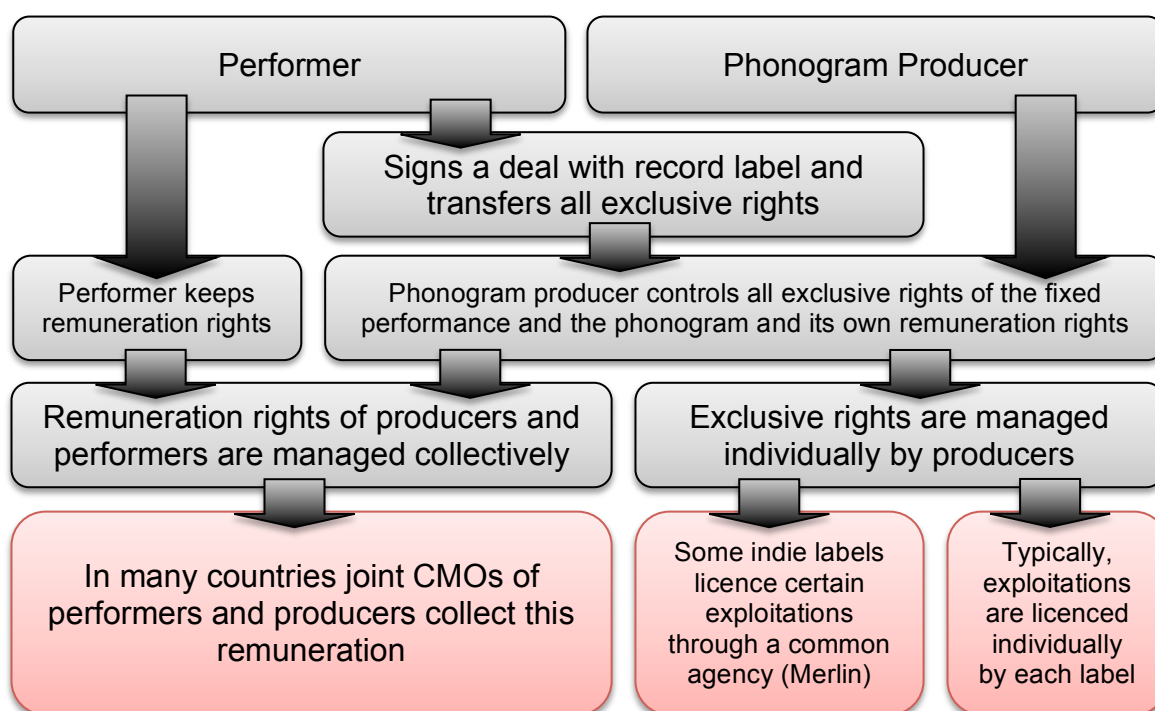
Additionally, both the phonogram producer and the performer will also have certain so-called remuneration rights, notably the right to an equitable remuneration for broadcasting and communication to the public of commercial phonograms. Unlike the exclusive rights, the remuneration rights of the performer, will not be transferred to the producer.

Remuneration rights are managed by performers' and record labels' Collective Management Organisations (CMOs). In fact, in many EU countries performers and record labels actually have joint CMOs or some sort of common collection agreements to manage these remuneration rights for holders of neighbouring rights. It should be noted, however, that these CMOs are different to those managing musical works, such as GESAC's member societies, which represent solely authors (i.e.: composers, lyricists, songwriters, etc.) and music publishers.

In any case, with the exception indicated below as regards the Spanish market, remuneration rights are irrelevant in the context of the Europeana Sounds project. Only the exclusive rights of reproduction and of making available (online rights) are applicable.

Exclusive rights will be managed individually by each record label. Therefore, a licence for the use of a phonogram (excluding the musical work) will only be granted by the record label that owns said phonogram. A notable exception is Merlin, an agency that licenses certain exploitations for an ever-increasing number of indie labels.

The following graph will illustrate how neighbouring rights are managed.



Europeana Sounds participating institutions would therefore have to clear the related exclusive online rights of phonograms – reproduction and making available rights – with each record label individually (unless they are affiliated with Merlin).

In most cases, a licence from the record label will be enough to clear all related rights, and the license is likely to be multi-territorial. However, two situations may complicate the clearance process in certain cases.

First, some countries (e.g. Spain) have introduced a requirement that remuneration for the making available of performances be paid to performers, through their CMO.

Also, it may be possible for certain performers to exercise their right introduced by Directive 2011/77 to demand that the rights transferred to the phonogram producer be returned to them.¹⁹ That would require that the rights be cleared with the performer or performers as well. Given that this is a fairly recent legislative development, it is unclear the impact that this measure will have on the market.

Since this report is limited to musical works, the specifics of these two situations are beyond its scope.

(f) Management of Music Rights: Publishing/Authors' Rights

As indicated above, the original owner of the rights in a musical work is its author. However, it is very difficult for authors to manage their rights by themselves. They simply don't have the capacity to licence their songs to music users (radio stations, online music providers, record labels, etc.), let alone negotiate adequate compensation for its use. For that purpose, authors need the assistance of music publishers and/or collecting societies.

What is a music publisher?

Some people think that music publishers and record labels are the same. Others believe they are just publishers of sheet music, and are therefore surprised that they play such a prominent role in today's music industry. The original role of a music publisher was indeed very similar to that of any other publisher, the only difference being that it didn't print and sell stories, but music. The main role of a music publisher was to acquire rights, in order to print and promote sheet music to be sold to performers, both professional and amateur, and used in concert halls and operas. This is something that continues to be done today, albeit its economic importance has greatly diminished. With the advent of recording technology and radio, the role of the music publisher changed dramatically. Today, promoting songs to increase the likelihood of them being recorded on an album, used in movies or played by radio stations, as well as directly licensing some uses of musical works, typically the printing of sheet music and the synchronisation of music on audiovisual works, has become their main activity.

It's important to point out that not all authors sign with a music publisher. Some opt for "self-publication", which basically means reserving the rights to one's own songs. Irrespective of whether the author decides to sign with a publisher or not, he or she will almost certainly become a member of a CMO. In fact, publishers are also members of CMOs. CMOs are entrusted with the management of rights by both music

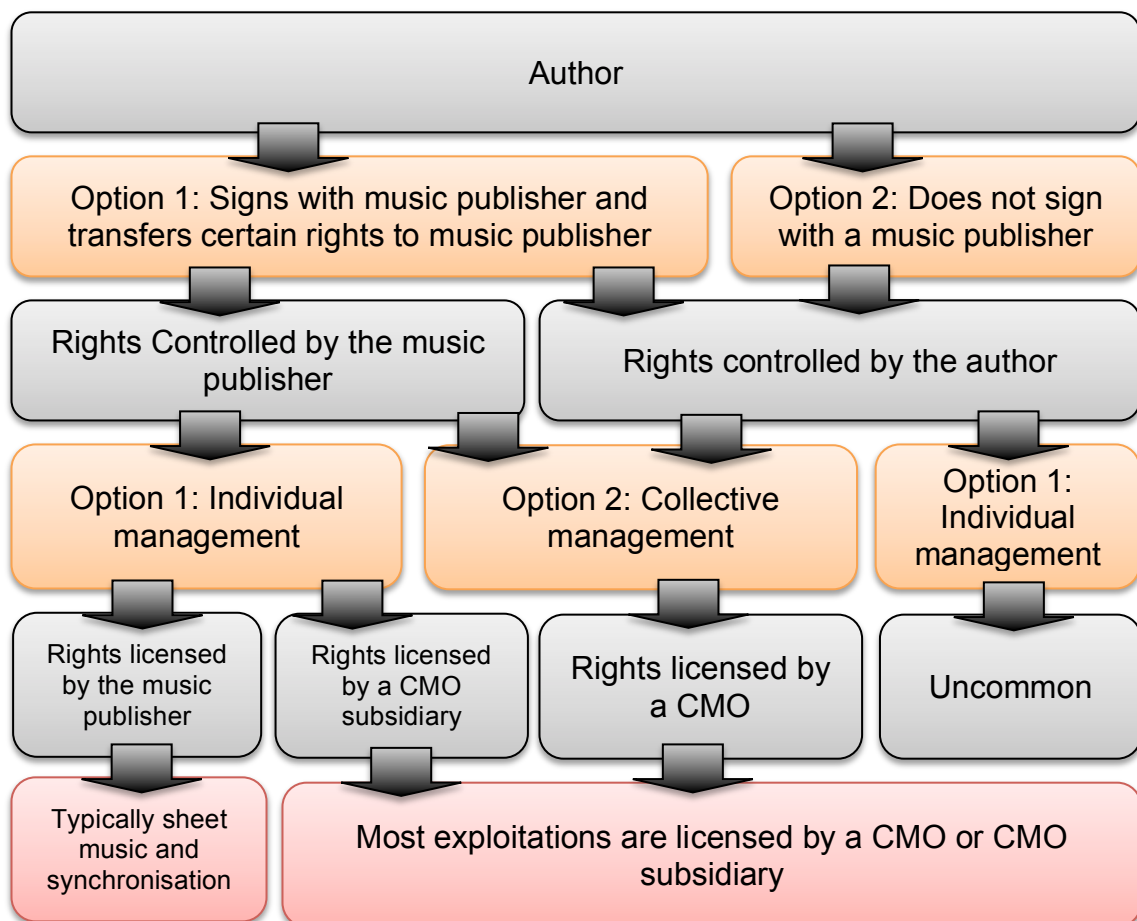
¹⁹ The recent amendment introduced by Directive 2011/77 to the Term of Protection Directive allows performers to get their rights back if the record producer does not market the sound recording during the extended period (after 50 years). (Art. 3.2.(a) of the Term of Protection Directive as amended by Directive 2011/77.)

publishers and authors, which means that they are the ones that will grant licences for the use of the musical works. Obviously, save for a couple of exceptions, music publishers and authors can elect to manage their rights independently. In the case of individual authors, this has traditionally been extremely rare, however, as indicated above it is not uncommon for music publishers to manage some rights independently, most notably print and synchronisation rights.

In recent times, certain major publishers have decided to withdraw the rights that they control from the CMO network and adopt a more active role in their management. In some cases, they have entrusted the management of the rights they control to one or several CMOs on either an exclusive or non-exclusive basis. In other cases, they have created new licencing entities, such as SOLAR (EMI Music Publishing and Sony/ATV Music Publishing repertoire). These entities are owned by and operate out of CMO offices.

Be that it as it may, and even in those cases where operators would technically have to clear certain rights with an entity such as SOLAR, in reality the contact point would still be a CMO.

The following graph will better illustrate the relationship between authors, music publishers and CMOs.²⁰



The bottom line is that, as regards musical works, and although certain music publishers manage certain exploitations directly, most exploitations are licensed by a CMO or CMO subsidiary. This significantly reduces the transaction costs of dealing with numerous authors and music publishers.

²⁰ Note that this graph does not take into account rights for which there is statutory collective management.

Note that the fact that most exploitations of musical works are managed collectively does not necessarily mean that the entire world repertoire can be cleared with one single CMO. In fact, CMOs can only grant licences to the rights for which management has been entrusted by the rights holder themselves, a sister CMO, or through a compulsory or extended collective licencing mechanism established by law.

In the past decade, on account of a number of reasons, there has been a process of repertoire fragmentation, notably as regards online rights. Clearing the rights for the entire world repertoire of musical works for multi-territorial exploitations with a single CMO is therefore no longer possible. However, there are initiatives in place to reverse the situation and reduce the number of transactions needed to clear the world repertoire.

The Directive 2014/26/EU on collective rights management and multi-territorial licencing of rights to musical works for online uses (the Collective Management Directive) is a step in the right direction, but it will take time for it to be implemented into national legislation and for the market to take full advantage of it.

In the meantime, the general rule is that CMOs can grant multi-territorial licences, albeit limited to the repertoire that has been directly entrusted to them by their members. As regards the rest of the world repertoire, the territorial scope of the licence will depend on the representation agreements signed with other CMOs.

As will be discussed in further detail in point 3.3(c), this means that certain multi-territory online exploitations require that rights be cleared with a number of different CMOs.

The resulting savings in terms of transaction costs, while not as significant as they would be in a one-stop shop rights clearance procedure, are still significant in comparison to individual management.

(g) Categories of Rights Holders that the Europeana Sounds Content Would Have to Be Cleared with

The following paragraphs describe the categories of rights holders required to clear each type of content to be made available through Europeana Sounds.

The following situation is assumed:

- The rights of the musical work and/or phonogram are not owned by the participating institution;
- Both the musical work and the phonogram are still under copyright protection (i.e.: not in the public domain);
- The rights holders have not already authorised their use; and
- Neither the musical work nor the phonogram are orphan.

Musical Phonograms

Musical phonograms seem to be the most common type of content to be made available on Europeana Sounds and would include phonograms in any medium, including digital files.

As indicated above, two subject matters would need to be cleared: the musical work and the phonogram in which the performance is embedded.

The Europeana Sounds participating institutions would typically have to clear the rights of the musical phonogram, first with a **CMO** (that holds the rights to the musical work), and secondly, with a **record label** or representing agency, such as Merlin (that holds the related rights).

In cases where the musical work is not registered with a CMO, it would have to be cleared directly with its **rights holder (e.g. author, heirs, etc.)**.

Non-Musical Phonogram

A non-musical phonogram would not contain a musical work, such as in the case of recordings of speeches or people speaking in different languages. In such instances, rights as regards the phonogram would have to be cleared only with the **phonogram producer**.

However, there would obviously be no need to clear rights as regards the musical work. Having said that, the phonogram may contain a different type of copyright-protected work, such as a spoken novel or poem, as in the case of an audiobook. In those cases, the author's rights as regards these works would have to be cleared with the respective **author, publisher or CMO for literary works**. However the specifics are beyond the scope of this report, which is limited to musical works.²¹

Sheet Music/Scores and Printed Lyrics

Sheet music would reflect the opposite situation. In this case, the author's rights would have to be cleared, but not the neighbouring rights, since there is no phonogram.

These rights would typically have to be cleared with the **music publisher**. However, certain **CMOs** report to be able to clear print rights provided they have received a specific mandate from the publisher.

In case of non-published sheet music, such as manuscripts, the rights would have to be cleared directly with the **rights holder (e.g. author, heirs, etc.)** of the musical work.

Images

The booklets and covers of records are also subject to copyright protection. Depending on the image, the record label may have acquired all the rights or just a licence to use it as a booklet or cover. In the first case, the rights will have to be cleared with the **phonogram producer** and in the second case with the **author** of the visual work. In both cases, these rights may have been entrusted to a **CMO** of visual rights. However, this is beyond the scope of this report, which is limited to musical works.

Music Videos

A music video is typically a promotional tool to boost record sales. Usually the rights of a music video are owned by the record label, which also owns the rights of the phonogram. That would, however, not include the rights to the musical work, which will continue to be owned by the owner of the author's

²¹ Note that some CMOs, including many that are members of GESAC, are multi-repertoire. These societies manage not only the rights of musical works, but also of literary, dramatic or visual works.

rights. Therefore, clearing rights of a music video would typically require acquiring a licence from the **phonogram producer** and the **CMOs** managing musical works.²²

²² There are other ways that music is used on videos, however it is assumed here that audiovisual works other than music videos are not included in Europeana Sounds.

3. Addressing the Barriers Identified by the Participating Institutions

This chapter describes the role that CMOs²³ of musical works play in facilitating the making available of copyright-protected material through Europeana Sounds.

It is assumed that there is no need to provide guidance as regards the clearance of rights of musical works in the following cases:

- When the phonogram is a recording of something that is not copyright-protected;
- When the participating institution owns the rights of the musical work;
- When the musical work is in the public domain; and
- When the musical work meets the conditions to be considered orphan under the Orphan Works Directive.²⁴

In addition, there are certain limitations to the assistance that authors' societies can provide.

Non-copyright related issues would obviously be excluded. It should be pointed out that the term *moral rights*, as used by Kennisland in the Summary Report of the survey, does not have the same meaning as non-economic rights granted to authors by the Berne Convention and a number of national copyright laws. Consequently, obstacles included in the fifth chapter of the Summary will not be addressed in this report.²⁵

Also, the scope of the assistance that CMOs can provide is *limited to the rights of musical works that they manage*. Rights not managed by CMOs, such as neighbouring rights, and rights for visual, literary and dramatic works are therefore excluded.

3.1 Assessment and Classification of the Copyright Related Issues in the Survey

One important aspect that can be perceived from the Summary Report is that the issues identified by the participating institutions refer mostly to the transaction costs of clearing rights.

Transaction costs are those "*incurred in making an economic exchange*" or simply "*the cost of participating in a market*."²⁶ In the case of the participating institutions, this would involve the cost of identifying and locating rights holders, the cost of having to negotiate with different rights holders, and so on. However, the actual licence fees are excluded from this category of costs.

²³ Note that from this point on any reference to a CMO will be considered a CMO managing musical Works.

²⁴ The reason why we understand that in this last case no solution is required is because one has already been provided with the Orphan Works Directive. Although, it still needs to be implemented by some EU Member States, it is just a matter of time for this issue to be solved.

²⁵ This report focuses on economic rights and their rights clearance process. Moral rights in the copyright sense, will therefore not be covered. Having said that, albeit usually excluded from rights clearance process discussions, moral rights may indeed affect said process.

²⁶ http://en.wikipedia.org/wiki/Transaction_cost accessed on 16 January 2015.

The issue of transaction costs has traditionally been of great concern to mass users of musical works, such as radio stations and TV broadcasters. CMOs have been instrumental in providing solutions to these massive uses of musical works, which in certain cases included blind-repertoire exploitations – those in which the operator does not know in advance the repertoire it will use (e.g. a radio station). There is therefore no reason why solutions could not be found to clear rights for Europeana Sounds related activities.

The following pages will be devoted to the assistance that authors' societies provide in order to reduce these transaction costs. Issues concerning licence fees will be addressed in point 3.3(b).

As regards the reasons for the copyright-related transaction costs, Kennisland's Summary Report divides them into the following three categories:

- Copyright issues in the online publication of audio material;
- Out-of-commerce works; and
- Domain constrained works.

We understand, however, that in this report it might be more practical to separate the identified issues in two broad categories:

- Assessment of the copyright status of musical works and identification and location of rights holders; and
- Rights clearance of musical works.

The out-of-commerce works issue, as well as the territorial limitations on the use of works will be addressed in the second point.

3.2 Assessment of Copyright Status of Musical Works and Identification and Location of Rights Holders

As indicated in Table 2 of the Summary Report, the issue that most Europeana Sounds participating institutions seem to have most trouble with is not so much the clearance of rights (35%), but the assessment of the copyright status of the content to be made available (59%), as well as the identification and location of rights holders (47% and 41% respectively).

The first issue would include establishing whether or not the content is in the public domain, or whether a copyright exception, notably the orphan work exception, is applicable.

As discussed above, under the current legislative framework the only copyright exception that would be applicable to any Europeana Sounds activity is the orphan work exception. The requirements for this exception to apply are developed in the next point.

The assessment of whether or not a work is in the public domain or orphan is closely linked to the second and third issues: the identification and location of rights holders, so we will address them together in point 3.2(b) below.

(a) The Orphan Work Status

As indicated above, the Orphan Works Directive introduced a new copyright exception to the *acquis*. The Directive was specifically tailored to provide a solution to a problem often encountered by entities such as the Europeana Sounds participating institutions. It is important to point out that the beneficiaries of this exception are in fact only “publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States.”²⁷

The exception allows these institutions to reproduce and make available works and phonograms, the rights holder or holders of which has not been identified or located, provided certain conditions are met:

1. The work must have been first published or broadcasted in the European Union, or, in the absence of publication or broadcasting, made publicly accessible with the consent of the rights holder or holders by the institution itself, provided it is located in the EU territory and provided it is reasonable to assume that the rights holder or holders would not oppose those uses;²⁸
2. The work must be part of the institution’s collection;²⁹
3. The uses are limited to those required in order to achieve aims related to the institution’s public-interest missions;³⁰
4. A diligent search has to take place in good faith.³¹

Requirements 2 and 3 should not pose major issues for the participating institutions. Requirement 1, on the other hand, may exclude certain works – those first published or broadcasted outside of the EU – from the potential application of the exception.

As regards requirement 4, the search for the identity and location of the rights holder or holders would consist of consulting the appropriate sources for the category of works in question – in this case musical works – as determined by Member States in their implementation legislation, which, as regards musical works and phonograms, would have to, at least, include the following:

- (a) Legal deposit;
- (b) The producers' associations in the respective country;
- (c) Databases of film or audio heritage institutions and national libraries;
- (d) Databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for phonograms;
- (e) The databases of the relevant collecting societies, in particular for authors, performers, phonogram producers and audiovisual producers;
- (f) Credits and other information appearing on the work's packaging; and
- (g) Databases of other relevant associations representing a specific category of rights holders.³²

The following point develops further the issue of the identification and location of rights holders.

²⁷ Art. 1 of the Orphan Works Directive. Emphasis added.

²⁸ Arts. 1.2 and 1.3 of the Orphan Works Directive.

²⁹ Art. 6.1 of the Orphan Works Directive.

³⁰ Art. 6.2 of the Orphan Works Directive.

³¹ Art. 3 of the Orphan Works Directive.

³² Point 4 of the Annex to the Orphan Works Directive. Note that this is a common list for audiovisual works and phonograms. Some sources might therefore not necessarily be applicable to musical works.

Note, however, that the permitted uses of orphan works are limited to the territory of the European Union. Outside the European Union, the legislation allowing for these uses would not be applicable.

(b) Identification and Location of Rights Holders

Correctly identifying and locating rights holders of musical works is probably the most relevant issue for the participating institutions, since it affects the establishment of the orphan, public domain, or in-copyright status of a work, and in the latter case who to clear its rights with.

Let's take a look at the different steps of the process and how the different options may affect the possibility to freely use the work.

Step 1: Identification – Who is the Author?

Since the term of protection is linked to the date of death of the author, the lack of identity of the latter would not allow for the public domain or in-copyright status to be determined.

Far from being a problem, the lack of identification of the work could actually simplify things for the participating institutions, since it could be considered orphan, and thus benefit from the orphan-work status, provided all the requirements introduced by the Orphan Works Directive (see point 3.2(a) above) are met.

If the author is, however, identified, then his or her date of death will be able to be established and thus whether the work is in the public domain or not. If the work is indeed in the public domain, the participating institutions will be allowed to use it without any further restrictions.

Step 2: Location – Where is the Rights Holder of the Work?

If musical work were still under copyright protection, the next step would be to locate its rights holder or holders. Should that prove impossible, the work would be considered orphan and could also be used without restriction (provided once again that the introduced by the Orphan Works Directive (see point 3.2(s)) are met).

If, on the other hand, the rights holder of the work under copyright protection were located, then the rights would need to be cleared.

(c) CMO's Assistance in the Identification and Location of Rights Holders of Musical Works

In the survey conducted by GESAC, the respondent authors' societies expressed their availability to provide assistance to current and future Europeana Sounds participating societies in the identification and location of rights holders of musical works.

This assistance would be extremely valuable, given the current size of the network of databases that societies have access to thanks to CIS-Net.

CIS-Net is a portal created under the auspices of GESAC's sister umbrella organisation CISAC (International Confederation of Societies of Authors and Composers)³³.

Through the CIS-Net portal, CISAC member authors' societies have access to metadata on more than 33 million musical works. The network allows more than 120 authors' societies in the world to consult the national and international repertoires of the databases connected to CIS-Net and allows them to perform real-time searches on works information available through CIS-Net anywhere in the world, at any time of day.³⁴

There is, therefore, no other database or database network on musical works more authoritative and that could provide better assistance to the participating institutions in the identification and location of rights holders.

The first reason for this is that two of the databases that must be consulted for a search for the identity and location of rights holders to be considered diligent are the CMO databases and databases of standards and identifiers. CIS-Net would obviously be the CMOs' database of reference, but also the database of standards and identifiers of musical works, since it incorporates a set of those international standards, such as the ISWC (International Standard musical Works Code) identifier.

The second reason would be that CIS-Net also provides rights management information about the work.

Therefore, having access to the resources of CIS-Net through an authors' society located in the same territory as the participating institution is of great assistance. Note that CIS-Net would provide information on works irrespective of the country where it was first published, broadcast or otherwise made publicly accessible.

It should be pointed out, however, that the assistance in the provision of information about the rights holder (e.g. contact details) could be limited by privacy regulations. Having said that, if the rights holder is in the CIS-Net database, their rights will probably be entrusted to a CMO. There might not be a need to contact them, since the rights would have to be cleared with their CMO.

Conversely, if the musical work is not part of CIS-Net, the difficulty (and costs) of identifying and/or locating the rights holders will rise significantly. Even in this situation, liaising with the local CMO can still be useful, since some of them either have their own in-house documentation and archival centre or they cooperate with external centres, through which the search can be continued.³⁵

Additionally, CMOs can supply information on the authors thanks to their membership database or through the international database available to them called IPI (Interested Party Information) where CMOs can detect to which CMO the author or the publisher belongs.

In any case, having a good relationship with the local authors' society should be a participating institution's priority. Some GESAC members not having been contacted yet by any participating institution, even if they are located in the same territory. For this reason, we have included the contact details of the relevant department within the societies in Annex I.

³³ Note that it is a requirement for GESAC members to belong to CISAC as well.

³⁴ <http://www.fasttrackdcn.net/our-products/cis-net/>

³⁵ See for example SGAE's Documentation and Archival Centre, CEDOA: <http://www.sgae.es/acerca-de/el-cedoa-de-la-sgae/> (in Spanish).

3.3 Rights Clearance of Musical Works

Once the identity and location of the rights holder of a musical work under copyright protection has been established, the next step would be to clear the reproduction and the making available rights. According to the Summary Report, 35% of Europeana Sounds participating institutions have already had or expect to have difficulties in this area.

As indicated above, CMOs can generally only grant licences for the online rights of the musical works, the management of which has been entrusted to them by rights holders or sister CMOs. However, in some cases, such as in extended collective licensing (ECL) mechanisms, CMOs may also manage rights that have not been directly entrusted to them.

In any case, though, a license would have to be acquired.

(a) The Importance of Licences

A licence is the way to ensure that the rights holders get paid for the use of their musical works. We have already established the difference between transaction costs and the actual licence fee. There is a general consensus that those transaction costs constitute an obstacle and should therefore be reduced as much as possible.

However, in certain cases the fact that a licence fee has to be paid has also been considered an obstacle to the development of Information Society services, the core of which is in fact copyright-protected content.

Such statements are unfair because typically, in those services there is a value chain, in which every input is remunerated. Take for example SoundCloud, which is an as yet unlicensed service, which provides a vast amount of copyright-protected content. Between that content and the final consumer there is a long value chain with lots of players who bring value to the chain. That chain would include the personnel that work for SoundCloud, the owner of SoundCloud's office space, the providers of its IT equipment and services, both to SoundCloud and to the final consumer, etc. All of the people and companies involved in providing those goods and services get paid. Currently, the only exception is the provider of the most important element – the rights holder of the musical works. Yet, trying to deny access to musical content due to lack of adequate compensation is often described as introducing obstacles to the development of the Information Society.

In many ways, a participating institution is in fact in a similar situation as other online service providers. For its resources to reach the final consumer it needs to procure a series of inputs, such as the scanning hardware equipment, the personnel, the Internet services, the physical facilities, etc., for which a series of players will expect to get paid. One of those providers is the rights holder of the content.

The fact, however, that the participating institutions' priority lies in reducing transaction costs, leads us to believe that there is an understanding that rights holders should be compensated, which is comforting.

(b) Types of Licences

In general, the approach that CMOs have as regards licencing is the so-called blanket licence approach. A blanket licence authorises the licensee to use the entire repertoire of a CMO in exchange for a licence fee. The fee takes into account to what extent the licensee will be using the repertoire, applying a percentage

on revenue or another element that can act as a proxy to the value of the music.³⁶ Note that once the fee has been agreed upon, it is payable irrespective of whether the repertoire of the CMO is used or not, or if another type of content, such as public domain works, is used.

(c) The Licence Fees

The tariff schedules that CMOs apply vary from country to country. However, the criteria to be taken into account in the tariff-setting process are to a certain extent determined by the *acquis*, both by the Collective Management Directive and by the case law of the European Court of Justice (ECJ). In addition, certain countries have passed legislation on the matter.

The fact that certain criteria have been established at EU level has provoked that there be no major variations in the fees charged for certain exploitations in the different countries. In fact, in the Tournier case³⁷, it was established that tariffs in one country cannot be appreciably higher than those charged in other Member States, unless the differences are justified by relevant objective reasons.

With that in mind, the question is whether or not it would be justified that CMOs apply specific tariffs tailored to the needs of non-commercial institutions such as those participating in Europeana Sounds.

Art. 16 of the Collective Management Directive establishes that “*licensing terms shall be based on objective and non-discriminatory criteria.*” That provision is based on case law of the ECJ, notably the Kanal 5 case³⁸, in which it was stated that CMOs may not apply dissimilar conditions to equivalent services and place them as a result at a competitive disadvantage, unless such a practice may be objectively justified.

Having said that, the legislation of certain countries establishes that, provided that the service is not commercial, its cultural or social nature should be taken into account in the CMOs tariffs, that is to say, that deductions should be foreseen for these types of services.³⁹

Note, however, that this is not a principle that has been harmonised, probably due to its controversial nature. First, if entities engaged in non-commercial cultural and/or social activities don't receive any deductions from any other goods and services that they may require, there does not seem to be any justification to treat copyright-protected content differently. Secondly, to the extent that these services may be providing a similar service as a commercial entity, applying different criteria may put the latter at a competitive disadvantage. In fact, absent provisions that allow for this differentiated approach, applying different tariffs depending on the nature of the licensee, might be in breach of current EU legislation if no clear objective justification could be found. Therefore, this potential conflict would have to be assessed on a case-by-case basis.

A different approach would be to make a distinction, not on the nature of the licensee, but on the nature of the service and the use of musical works. Some societies do in fact adopt this approach. PRS for Music, for instance, offers a Limited Online Music Licence (LOML) for small online services offering music or general entertainment. This blanket licence is available for a reduced fee that starts at £129 + VAT⁴⁰ to

³⁶ A per-use fee may also be applied in digital services. In the case of streaming there would be certain minimum fee per stream.

³⁷ Case C-395/87 *Ministère public v Jean-Louis Tournier*.

³⁸ Case C-52/07, *Kanal 5 Ltd, TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa*.

³⁹ See for example art. 13.3 of the German Law on the Administration of Copyright and Related Rights or the new art. 157. 1 of the Spanish Intellectual Property Law.

⁴⁰ Note that the actual rates depend upon the type of service and the level of music usage.

services that generate less than £12,500 in annual gross revenue and have limited usage (e.g. a maximum of 450,000 on-demand streams).

Whatever the approach, CMOs are always open to introducing new schemes, or adapting current ones, to better meet the needs of the different services, including cultural heritage institutions, provided that these schemes are non-discriminatory and the value of musical works is not undermined.

(d) Licence Acquisition and Territorial Restrictions

The territorial scope of the licences that CMOs grant depends on two issues. The first is whether they comply with the European rules on multi-territorial licensing. Only those CMOs that comply with the rules established by Title III of the Collective Management Directive are allowed to grant multi-territorial licences for online rights.

The second issue that determines the territorial scope of the licence is the scope of the mandate given to the CMO to manage online rights. That territorial scope may vary depending on the type of repertoire.

CMOs don't generally have any restrictions to grant multi-territorial licences for repertoire, the management of which was directly entrusted to them by the rights holders themselves (the society's repertoire). Therefore, if the musical works that the participating institutions want to clear are part of that repertoire, then the licence as regards these works will cover multi-territorial exploitations.

The rest of the repertoire is managed by societies by virtue of reciprocal representation agreements. As regards this repertoire the territorial scope of the license will depend on the terms of such agreements. In many cases the mandate is limited to the society's territory. Therefore, licences covering this repertoire would not cover worldwide exploitations.

Note that there are many reasons why part of the catalogue made available by the participating institutions may be subject to some sort of geo-blocking. However, as regards musical works, the main reason would be that some operators, the activities of which are primarily focused in a local territory, decide to obtain just the licence with the local CMO. In those cases, that license would cover the combined repertoire of the CMOs, but would not allow for a multi-territorial exploitation.

Having said that, in some cases, the territorial scope of the mandate granted to CMOs will indeed be worldwide, and so will be the scope of the licence covering this repertoire.

Therefore, clearing rights for multi-territorial exploitations might, in certain cases, require dealing with more than one CMO. The number of CMOs to deal with will depend on the variety of the catalogue needed.

(e) CMOs Assistance in the Rights Clearance Process

The obvious assistance that CMOs can provide to participating institutions in the rights clearance process would be the licencing of the repertoire. However, when the licence does not cover the world repertoire for multi-territorial exploitations, CMOs can also help in simplifying the rights clearance process.

CMOs can provide rights management information about the musical works that they are not allowed to licence beyond their territory.

(f) Roadmap for the Rights-Clearance Process of Musical Works for Multi-Territorial Exploitations

The following roadmap intends to give step-by-step guidelines to the rights clearance process of musical works. It assumes that the intention of the participating institutions is to ultimately offer a multi-territorial service. Therefore, the rights clearance process for domestic exploitations only is excluded.

Additionally, it assumes that libraries are users of a substantial amount of musical works and that therefore they need to clear the entire world repertoire. Finally, it gives indications on how to clear rights managed by CMOs. Those musical works that have not been entrusted to a CMO would have to be cleared directly with the rights holder.⁴¹

Step No. 1: Checking the Copyright Status with the Local CMO

In any case, the first step will be to contact the local CMO and check the copyright status of the musical works included in the participating institution's catalogue. If all musical works in the catalogue happen to be in the public domain or orphan under the Orphan Works Directive, no licence will be required to use the works. If that is not the case, a licence is required.

⇒ **Outcome of Step No. 1:** Public domain and orphan works under the Orphan Works Directive have been identified and they can be made available by the participating institution.

Step No. 2: Checking if the Content of the Catalogue Is Already Available through Commercial Services

The second step would be to check if the content the rights of which need to be cleared is already available through a licenced commercial service. If that is the case, the participating institution could opt to just provide a link to those commercial services, making that content available. That would save the participating institution the time and money of actually clearing those rights. If however, the content (or part of it) is not available through commercial platforms, or if it is and the participating institution wants nonetheless to also make it available through its website, it will have to clear the necessary rights.

⇒ **Outcome of Step No. 2:** The availability of the content through licenced commercial services has been checked and the participating institution can opt to provide a link to those services instead of making that content available themselves.

Step No. 3: Obtaining a License from the Local CMO

The third step would be to clear rights with the local CMO for a multi-territorial exploitation. Due to the current repertoire fragmentation situation, the repertoire covered by that licence will not be the entire world repertoire. The extent of it will vary from CMO to CMO, depending on the agreements it has with sister CMOs and music publishers that have withdrawn their repertoire from the CMO network.

⁴¹ As indicated above, on this issue CMOs can merely provide assistance in locating the rights holder. In those countries where an extended collective licensing (ECL) mechanism exists, the rights could be cleared directly with the local CMO. However, that clearance would be national in scope. For multi-territorial exploitations, this roadmap would still have to be followed.

In any case, the licence will cover the repertoire directly entrusted to it by its members. Additionally, if the CMO is part of a hub, like Armonia or ICE, the scope of the licence would cover the combined repertoires of the CMOs participating in the hub. Finally, the society might have been appointed by one or several music publishers to manage its repertoire. In that case, the licence will cover that repertoire too.

⇒ **Outcome of Step 3:** The participating institution has cleared the rights of the musical works managed by the CMO.

Step No. 4: Clearing the Remainder of the Rights

The next step would be to clear the rights not managed by the CMO. Basically, this means clearing rights of the repertoire of other CMOs and of music publishers that have withdrawn their repertoires from the CMO network.

The repertoire of the local CMO's sister societies would have to be cleared directly with them or with the hub that they are part of, if they are part of one.

Currently, there are two hubs grouping 11 CMOs⁴²:

- Armonia, which includes SACEM (France), SGAE (Spain), SIAE (Italy), SABAM (Belgium), ARTISJUS (Hungary), SPA (Portugal), SACEM Luxembourg (Luxembourg) and SUISA (Switzerland);
- ICE, which includes PRS for Music (UK), GEMA (Germany) and STIM (Sweden).

Additionally, the participating institutions will have to clear the rights that certain music publishers withdrew from the CMO network.

Those rights will have to be cleared directly with the following CMOs and entities:

- EMI Publishing and Sony/ATV Anglo-American repertoire with SOLAR, which is operated by PRS for Music (UK) and GEMA (Germany);
- Universal Music Publishing's Anglo-American repertoire with SACEM (France), and Sony/ATV Latin-American repertoire with SGAE (Spain). Both societies negotiate such rights within the framework of Armonia, together with SIAE (Italy), SABAM (Belgium), ARTISJUS (Hungary) and SUISA (Switzerland);
- Warner Chappell's repertoire with PRS for Music (United Kingdom), STIM (Sweden), SACEM (France), SGAE (Spain) or BUMA-STEMRA (Netherlands); and
- The Anglo-American repertoires of a number of independent publishers with IMPEL, which operate from PRS for Music (UK).

As you can see, all these rights can be cleared through CMOs that are part of pre-existing hubs, thus reducing the number of clearance stops.

Although the process of repertoire re-aggregation is on-going and the number of clearance stops will be reduced further in the coming months, for the time being the rights of the CMOs that are not part of a hub will need to be cleared directly with them.

⁴² Note that in reality, different licences might be granted, albeit in one single act.

⇒ **Outcome of Step 4:** The rights for the entire repertoire entrusted to CMOs or controlled by music publishers have been cleared and the musical works can be used.

3.4 Analysis of Potential Solutions to Facilitate the Rights Clearance Process

As indicated above, the rights clearance process for multi-territorial exploitation is in the process of re-aggregation, and clearing the entire repertoire requires dealing with a number of CMOs. In addition, certain musical works are not part of the repertoire managed by the CMOs, which requires clearing those rights directly with their individual rights holders.

The following pages therefore analyse certain solutions, already provided by national legislation, as well as others that have been suggested in Kennisland's Summary Report, such as the introduction of special provisions to deal with out-of-commerce works.

Finally, we will analyse solutions developed by CMOs in the context of other types of exploitations.

(a) A Solution for Out-of-Commerce Works

Kennisland's Summary Report of the survey dedicates point 3 to out-of-commerce works, describing the importance of this category of works in the catalogue that some of the participating institutions makes or intends to make available through Europeana Sounds.

Making available content that is not available through customary channels of commerce is precisely the kind of activity that a project such as Europeana Sounds is particularly useful for. Having said that, there is currently no harmonisation on the matter. The *Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works* is limited to books and journals. It does not extend to musical works or phonograms. The same seems to be true as regards legislation on this matter enacted by certain EU members.⁴³

The Summary Report seems to imply that introducing an out-of-commerce works legal framework for (or extending the existing ones for books and other writings to) musical works and phonograms would facilitate the making available of copyright-protected content by the participating institutions.

However, there are a couple of valid reasons that explain why musical works and phonograms were excluded from the MoU, and probably from existing legislation in the EU, in the first place.

First, the market of books and other writings is different from that of musical works and phonograms. The main business of books and other writings is through publication, mostly in printed form, but lately also in electronic form. The importance of audiobooks – a phonogram – is quite limited. In music it's quite the opposite. The importance of sheet music is quite reduced in comparison with other ways of enjoying music, such as in the form of a sound recording. Moreover, music is enjoyed in a variety of situations, for instance, when it's played live, when it's broadcast, when it's played in a venue, etc., all of which are considered "*customary channels of commerce*".

⁴³ The Austrian legislation on the matter would in fact be applicable to out-of-commerce musical works. However, the uses allowed for works considered out of commerce seems to be quite limited and would therefore not be applicable to Europeana Sounds like activities.

One of these channels, for example – the legal online market of recorded music – is extremely developed, much more than that of books or any other copyright-protected content. These services make an overwhelming amount of music available to consumers. If at some point it might have made sense to no longer distribute copies in physical form of a specific product, that logic no longer applies in the online world. The costs are so low that it does not make sense for rights holders not to make all of their content available in one way or another. The tendency today by music rights holders is therefore to actually make all of their music available through online channels.⁴⁴

iTunes alone reports having a 43 million-song catalogue.⁴⁵ In fact, music rights holders have made available more music than what the market (i.e. the consumers) can actually bear. The wealth of available music online is actually so vast that a significant amount of the available music has never been accessed. Spotify, for example, reports that 20% of its 20 million song catalogue has never been played, not even once.⁴⁶

Secondly, as we already discussed, there are two main categories of subject matters in a musical phonogram: the musical work and the sound recording of the performance. In fact, it is often the case that different performances of the musical work are recorded by the same or different artists, meaning that a phonogram may be out-of-commerce while the musical work is not.⁴⁷

A third reason may be found in the fact that collective management is the prevalent form of management as regards musical works (and is also widely used as regards phonograms). This is due to the fact that many of the business models that exist in the music industry – notably all forms of communication to the public – require that rights be managed collectively. Users of music, particularly blind users of repertoire, rely on blanket licences, which are granted by CMOs.

This makes it very unlikely that a musical work that may have at some point been recorded on a phonogram, published as sheet music, or communicated to the public during the XX or XXI century not be registered with a CMO either by the author or the music publisher. All of these musical works are part of the combined repertoire of all CMOs in the world, and are therefore always available for licence by a CMO, and thus “*available through a customary channel of commerce*”.

Since this report is focused on musical works, an analysis of the importance of the out-of-commerce issue as regards phonograms is beyond its scope, but many of the things said as regards musical works do indeed apply to phonograms.

An additional argument against the application of out-of-commerce work regimes to musical works is that it would probably not greatly simplify the clearance process of musical works for the participating institutions.

If we take German law⁴⁸ as a reference, we see that the issue is addressed by turning to collective management. As already mentioned, collective management is already the rule for musical works.

⁴⁴ Certain major artists have purposely decided to exclude their music from certain digital platform, but that does not mean that it is not available through other channels of commerce.

⁴⁵ <https://www.apple.com/uk/itunes/>, accessed on January 11, 2015.

⁴⁶ <https://news.spotify.com/us/2013/10/07/the-spotify-story-so-far/>, accessed on January 15, 2015.

⁴⁷ The opposite would, however, not hold. By definition, if a phonogram is in commerce, the musical work embedded in it will be too.

⁴⁸ Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes.

The main difference is the introduction of an extended collective management system, granting a representative CMO the power to licence works, even if its management has not been entrusted to it. However, the territorial scope of this extended collective management system is limited to Germany. For multi-territorial exploitations, the CMO will only be able to grant licences to the repertoire of its represented rights holders.⁴⁹

As it has already been established, clearing rights of musical works for mono-territorial uses is not a major issue, since in most cases it can be done through a single society. It is with the multi-territorial clearance of rights where the transaction costs of having to deal with several CMOs escalate. This situation is, however, not solved by the solution introduced by existing legislation on out-of-commerce works, such as under German law. In order to address this issue, the collaboration of all the European CMOs is needed.

A final point that merits attention is the fact that any solution, be it legislative or through voluntary agreements, that is limited to the out-of-commerce issue would by nature be incomplete. In-commerce works, works that were not intended to be in-commerce in the first place, and works, the status of which is unclear, would still need to be cleared by other means.

For all of the above reasons, a solution as regards out-of-commerce musical works would affect a very limited amount of works and therefore not significantly reduce transaction costs.

(b) Solutions Provided by Extended Collective Licencing Mechanisms

Is it has been established that CMOs can provide important savings of transaction costs in terms of simplified solutions for the identification and location of rights holders and for mass rights clearance of musical works. However, there are two situations, which would not necessarily be covered by these solutions.

The first one would be when an orphan work was first published or broadcasted outside the EU, in which case the exception introduced by the Orphan Works Directive would simply not apply.

The second case would consist of works, the management of which has not been entrusted to a CMO.

In both cases the rights clearance process would become either very complicated or simply impossible, preventing the participating institution from making the work available.

This situation is, however, not limited to activities of making available the musical heritage. It can affect other types of mass uses of musical works.

The way those situations have been addressed in certain countries is with the introduction of an extended collective licencing (ECL) mechanism.

Such systems are particularly common in the Nordic countries. However, they can also be found in other countries, and even in the EU *acquis*.⁵⁰

⁴⁹ The MoU dedicates its Principle 3(1) to this issue: *"If the scope of an Agreement entered into pursuant to Principle No. 1(2) and No. 1(3) includes cross-border and/or commercial uses, the collective management organization may limit its license of works that are out-of-commerce to those of represented rights holders."*

⁵⁰ For example in the Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (the Satellite and Cable Directive).

According to Tarja Koskinen-Olsson, and ECL system is defined as “*provisions in the law giving an extension effect to clauses in a collective licencing agreement in specific areas of copyright and related rights. This extension applies to right holders who are not members of the collecting organisation.*”⁵¹

Its basic elements are:

- “*the CMO and the user conclude an agreement on the basis of free negotiations;*
- *the CMO has to be representative in its field [e.g. musical works];*
- *the agreement is made legally binding on non-represented rights holders;*
- *the user may legally use all materials without needing to meet individual claims by outsiders and criminal sanctions;*
- *non-represented rights holders have a right to individual remuneration; and*
- *non-represented rights holders have in most cases a right to prohibit the use of their works [opt-out mechanism].”*⁵²

ECL mechanisms are usually applied to situations where there is a mass use of copyright protected content and where the market has not been able to provide rights clearance mechanisms with reduced transaction costs, notably when collective management is not sufficiently developed.

The benefits for users are obvious, notably in the reduction of transaction costs and increased legal certainty. Rights holders, on the other hand, see their right to decide how they want to manage their rights somewhat limited.

Normally, rights holders have the opportunity to wilfully entrust the management of their works to a CMO. Unless they entrust the management to a CMO, it will be understood that they will manage those rights independently.

In an ECL system, however, the rights holder’s decision with respect to the management of his or her rights is reversed. They would have to opt-out from the system, in order to manage their rights individually.

This is a fundamental change for rights holders. Therefore, ECL systems should have, not only an opt-out mechanism, but also a right for rights holders that are not members of the appointed CMO to claim remuneration from it.

Also, ECL systems are usually limited to certain very specific cases defined by the law.⁵³

In any case, it seems that at least one Europeana Sounds participating institution, the State and University Library in Denmark, has already benefited from the Danish ECL system to make its content available.

⁵¹ Koskinen-Olsson, Tarja, *Collective Management in the Nordic Countries*, Chapter 9 of Gervais, Daniel (ed.), *Collective Management of Copyright and Related Rights*, Alphen aan den Rijn: Kluwer Law International, 2010.

⁵² Koskinen-Olsson supra 52. Additions in brackets.

⁵³ Denmark would seem to be the exception. The Danish law provides for a general possibility to introduce an ECL mechanism. In cases where rights cannot be cleared individually by rights holders, if the user and the sufficiently representative CMO so decide it, they can apply to the Ministry of Culture for their agreement to have an ECL effect.

The ECL system addresses loopholes in the rights clearing process. However, the Nordic ECL systems have a fundamental limitation, namely that their territorial application is national in scope. Therefore, these ECL mechanisms do not solve the issues affecting multi-territorial exploitations.

In these cases, the situation described in point 3.3(c) would still prevail. It should be pointed out that one of the reasons why ECL mechanisms have worked well in the Nordic countries has been the fact that rights holders have not opted out from the system, as they have the right to. However, a potential consequence of extending the territorial scope of such a system to multi-territory exploitations could potentially trigger the exercise of that right, provoking a repertoire fragmentation situation.

(c) Solutions Developed by CMOs

In the previous points we have analysed different approaches that are based on existing or proposed legislation, and highlighting certain situations that may still remain unresolved.

Another approach would be to allow the market to come up with solutions for repertoire re-aggregation.

Apart from the process of re-aggregation that the market is currently undergoing as a consequence of adoption the Collective Management Directive, other initiatives have already taken place.

In April 2014, public service broadcasters, composers/songwriters, music publishers and collective management organisations launched an industry initiative to facilitate licencing of broadcast-related online activities. The parties' respective European umbrella organisations, EBU, ECSA, ICMP and GESAC itself, agreed on a Recommendation that sets out the principles which will encourage the aggregation of rights for the licencing of the above-mentioned activities on a cross-border basis.⁵⁴

The Recommendation establishes common principles that strike a balance between the stakeholders' interests and objectives to lead to the cross-border licencing of public service broadcasters. It therefore promotes a voluntary re-aggregation of rights, as well as high levels of transparency for authors/composers and publishers, fair compensation, and efficient, modern and non-discriminatory administration arrangements.

Discussions about other similar initiatives with other stakeholders are on-going, which proves that the rights holders of musical works are ready to find solutions to the needs of music users.

Additionally, solutions like these might be easier and quicker to implement than those that require the adoption of new legislation.

3.5 Collaboration with Mainstream Distribution Platforms

The Summary Report indicates the intention of the Europeana Sounds network *“to expand to include [...] mainstream distribution platforms (Historypin, Spotify, SoundCloud) to ensure the widest possible availability of their content.”*⁵⁵

⁵⁴ The Recommendation can be downloaded from the following link:

<http://www.authorsocieties.eu/mediaroom/download/154/attachement/ebu-ecsa-gesac-icmp-recommendation-for-the-licensing-of-broadcast-relate....pdf>

⁵⁵ Page 4 of the Summary Report.

The potential collaboration of the participating institutions with commercial online music services deserves some comments.

First, it should be noted that such platforms require their own separate licences to operate. A licenced participating institution would not be able to sub-licence the use of the musical works. Additionally, those services would not be able to benefit from the orphan works exception, since they are not publicly accessible libraries, archives or museums. They are commercial businesses. Finally, it should be pointed out that some of the services, notably SoundCloud, are, for the time being, unlicensed.

Having said that, partnering with licenced commercial services, such as Spotify, could be a solution in cases where there might be difficulties in the clearance of rights of certain musical works. If the same version of the musical work is already available through the licenced service, the participating institution could opt to provide a link to the musical work in that service instead of making it available itself.

3.6 The Specific Case of the Europeana Sounds Portal

So far we have discussed the issues that the participating institutions face when making copyright-protected musical works available through their websites. While the consumer may access that content using the Europeana Sounds portal, in reality that content is stored and made available by the participating institution's website that the consumer is directed to.

Having said that, the Europeana Sounds portal itself does store and make available snippets of those musical works.

It should be pointed out that the fact that the participating institutions may have cleared the online rights for their material does not mean that the content can be stored and made available, even in a snippet form, by a third party such as the Europeana Sounds portal. As indicated in the previous point, the participating institutions would in principle not be allowed to sub-licence uses of the musical works. This would mean that the Europeana Sounds portal would have to clear all rights for the entire collection of musical works.

While ways for CMOs to facilitate this process as regards the repertoire they manage can be explored, it is not entirely clear that the Europeana Sounds portal would be able to benefit from the orphan works status. In theory only publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations are beneficiaries of the exception, and technically the Europeana Sounds project is none of those.

4. Summary of the Assistance that CMOs Could Provide to Europeana Sounds Participating Institutions

4.1 Assistance Already Available

The previous section was dedicated to addressing obstacles that the participating institutions (and the Europeana Sounds portal) would be faced with in order to make their resources available. Also, it was explained to what extent CMOs could provide assistance throughout the clearance process, thus reducing transaction costs.

Notably, the assistance that GESAC members can already provide to participating institutions located in their territory is the following:

- Assistance in the identification and location of rights holders of musical works through the CMO databases, notably CIS-Net, and the databases of CMOs (or CMO-sponsored) archival and documentation centres;
- Provision of rights management information about the rights holders to the extent that it is permitted by privacy regulations; and
- Grant of licences for the online rights of the repertoire managed by the CMO for the territory or territories allowed by the mandate given by rights holders, sister societies or by the law.

Note that Annex I provides the contact details of responsible departments within GESAC members.

Additionally, some GESAC members have shown their availability in providing further assistance to the participating institutions located in their territory, such as acting as liaison with sister CMOs for the full clearance of rights for multi-territorial exploitation. See Annex II for more details.

4.2 Further Forms of Cooperation

Further forms of cooperation between GESAC and the participating institutions in order to facilitate the rights clearance process can also be explored, provided of course that any such initiative is sanctioned by members of the CMOs (authors and music publishers).

ANNEX I⁵⁶

Points of contact with CMOs managing musical works (GESAC⁵⁷ members)

Country	Society	Address	Phone	Department in Charge of Clearance	Contact Person	Email	Department in Charge of Assistance in Copyright Status	Contact Person	Email
Austria	AUME-AKM	Baumannstraße 10, AT-1030 AUSTRIA	+43 (0)50717	New Media	Siegfried Samer	online@akm.at	Documentation	AKM: Christian Keber AUME: Waltraud Schmidt	christian.keber@akm.at Waltraud.SCHMIDT@akm.at
Belgium	SABAM	Rue d'Arlon 75, B-1040 BELGIUM	+3222868211	Media & Online	Cees Van Rij	contact@sabam.be	Media & Online	Cees Van Rij	contact@sabam.be
Croatia	HDS ZAMP	Heinzlova 62a HR 10000 Zagreb, CROATIA	+385 (1) 6387083	Media & New Technologies Department	Darko Staničić	darko.stanicic@hds.hr	Documentation and Distribution	Smiljana Klein	smiljana.klein@hds.hr
Czech Republic	OSA	Čs. armády 20, 160 56 Praha 6 CZECH REPUBLIC	+420 220 315 378	Broadcasting, online and mechanical rights department	Tomáš Matějčíný	online@osa.cz tomas.matejcnny@osa.cz		Ondrej Kacer	ondrej.kacer@osa.cz
Denmark	KODA	Lautrupsgade 9 DK-2100 Kopenhagen O DENMARK	:+45 33 30 63 80			http://www.koda.dk/eng/home/			
Finland	TEOSTO	Urho Kekkosen katu 2 C, FIN-00100 Helsinki FINLAND	+358 9 681 011			teosto@teosto.fi			teosto@teosto.fi

⁵⁶ ANNEXES I and II of this report are not covered by the Creative Commons 4.0 licence and the commercial use, modification and transformation of their content are reserved.

⁵⁷ The CMOs of the following EU countries are not members of GESAC: Bulgaria, Slovenia and Estonia.

France	SACEM	225, avenue Charles de Gaulle F-92528 Neuilly Sur Seine Cedex FRANCE	+33 (1) 47 15 47 15	Online licensing department	Caroline Champarnaud	caroline.champarnaud@sacem.fr	Online licensing department	Caroline Champarnaud	caroline.champarnaud@sacem.fr
Germany	GEMA	Rosenheimer Straße 11 81667 München GERMANY	+49 (89) 48003 00	Sendung und Online (Broadcasting and Online)		gema@gema.de	Mitglieder und Repertoire-Management (Members and Repertoire Management) ⁵⁸		gema@gema.de
Greece	AEPI	Samou 51 & Fragoklissias Maroussi 15125 Athens GREECE	+300-2111029283	On Line & Broadcasting Department	Aletras Dimitris	newmedia@aepi.gr	On Line & Broadcasting Department	Aletras Dimitris	newmedia@aepi.gr
Hungary	ARTISIUS	1016 Budapest, Mészáros u. 15-17 HUNGARY	+361488 2663	Hangfelvétel Engedélyezési Osztály	David Kitzinger	david.kitzinger@artisjus.com	Legal Department	Dr. Eszter Kabai	ekabai@artisjus.com
Iceland	STEF	Sudurvangur 23a, IS- 220 Hafnarfjörður ICELAND	+354 561 6173	Collection and Marketing Department	Hrafnkell Pálmarrsson	Hrafnkell@stef.is	Same		
Ireland	IMRO	Copyright House - Pembroke Row, Lower Baggot Street IRL-Dublin 2 IRELAND	+353/1 661 4844	Broadcast & Online Licensing	Sean Donegan	Sean.donegan@imro.ie	Licensing	Sean Donegan	sean.donegan@imro.ie
Italy	SIAE	Viale della Letteratura n° 30 I - 00144 Roma ITALY	+39/06 5990-21			http://www.siae.it/Index.asp			
Latvia	AKKA/LAA	A.Caka 97, Riga, LV-1011 LATVIA	+371 67506131		Aivars Ginters	aivars.ginters@akka-laa.lv		Anita Sosnovska	anita.sosnovska@akka-laa.lv

⁵⁸ Note that this department is run by GEMA's office in Berlin (Bayreuther Straße 3, 10787 Berlin, Germany. Phone: +49 30 21245 300). Additionally, the database of musical works is available at <https://online.gema.de/werke/search.faces>.

Lithuania	LATGA	J. Basanavičiaus str. 4B LT-01118 Vilnius LITHUANIA	+370 5 2651429	NCB Lietuva	Nerijus Jauneika	nerijus@ncb.lt		Ruta Vareikiene	ruta@latga.lt
Luxembourg	SACEM Luxembourg	76/78 rue de Merl L-2146 LUXEMBOURG	+352.47 55 59	Marc Nickts		Marc.nickts@sacemlux.lu		Marc Nickts	Marc.nickts@sacemlux.lu
Nordic - Baltic Countries	NCB ⁵⁹	Hammercihsgade 14 DK-1611 Copenhagen V DENMARK	+45/33 36.87.00			ncb@ncb.dk http://www.ncb.dk/05/5-3.html			ncb@ncb.dk
Norway	TONO	TONO Boks 9171, Grønland 0134 Oslo NORWAY	+47 22057200			http://www.tono.no/english/			
Poland	ZAIS	00-92 Warsaw ul. Hipoteczna 2 POLAND	+48/22. 828.17.05	Licenses and Collection Dpt.	Anna Zakrzewska	anna.zakrzewska@zais.org.pl	General Membership	Sekcja Członkowska	sekcja.czlonkowska@zais.org.pl
Portugal	SPA	Av. Duque de Loulé, 31, 1069-153 Lisboa PORTUGAL	+ 351 21 359 4400	Musical Rights Department	Andreia Andrade	andreia.andrade@ spautores.pt	Documentation Department	Alexandre Miranda	alexandre.miranda@ spautores.pt
Romania	UCMR-ADA	Calla Victoriei, no.141, Sector 1 Bucharest, 010071 ROMANIA	+40 213 16 7976						

⁵⁹ Please note that NCB issues licences for the recording, manufacture and distribution of music on physical as well as digital media. All the Nordic/Baltic national societies have “re-assigned” the administration of reproduction rights to NCB. The rights involved in online distribution of music are jointly administered by NCB and the national societies. For questions related to work documentation, please contact local societies members of NCB.

Slovakia	SOZA	Rastislavova 3, 82108 Bratislava SLOVAKIA	+42 1255569362	Broadcasting, Retransmission and Online Services Department	Marek Očkay	online@soza.sk	Documentation	Robert Oswald	robert.oswald@soza.sk
Spain	SGAE	Calle de Fernando VI nº 4, Madrid SPAIN	+34 913499550	Derechos Digitales- Online Rights	Clemente Sánchez	clsanchez@sgae.es	Operaciones	Elisa García Villar	egarcia@sgae.es
Sweden	STIM	Svenska Tonsattares Internationella Musikbyrå P.O. Box 17092 SE - 104 62 Stockholm SWEDEN	+46 8-783 88 00	Market & Saled Dept.	Nicklas Sigurdsson	Nicklas.sigurdsson@stim.se	Documentation	Nils Danielsson	stim@stim.se
Switzerland	SUISA	Bellariastrasse 82 CH-8038 Zurich or Postfach 782 CH-8038 Zurich SWITZERLAND	+41/44.4824333	New Media	Daniel Köhler	daniel.koehler@suisa.ch	Members' Department	Claudia Kempf	Claudia.kempf@suisa.ch
The Netherlands	BUMA-STEMRA	Siriusdreef 22-28 2132 WT Hoofddorp THE NETHERLANDS	+31 237997999	Digital & Audiovisual	Michiel Laan	Michiel.laan@bumastemra.nl	Via the licensing team	Michiel Laan	Michiel.laan@bumastemra.nl
United Kingdom	PRS for Music	2 Pancras Square London N1C 4AG UK	+44 20 3741 4260	Broadcast and Online	Nick Edwards	nick.edwards@prsformusic.com	Via the licensing team		nick.edwards@prsformusic.com

ANNEX II⁶⁰

Assistance that GESAC members would be willing to provide to Europeana Sounds participating institutions

Country	Society	Copyright Status of Works	Type of assistance including limitations	Identification and Location	Type of assistance including limitations	Rights Clearance for Domestic Uses	Type of assistance including limitations	Rights Clearance for Multi-territorial Uses	Type of assistance including limitations	Assistance in liaising with other CMOs for full rights clearance	Other
Austria	AUME-AKM	X		X		X	Limited to mandated repertoire.				
Belgium	SABAM	X		X	Location limited to indicating if RH is member of a CMO and if so which one	X	Limited to mandated repertoire.	X	Limited to mandated repertoire.		
Croatia	HDS ZAMP	X	If available	X	Location limited to indicating if RH is member of a CMO and if so which one	X	Limited to mandated repertoire			For societies in ex-Yu region	
Czech Republic	OSA	X				X	Limited to mandated repertoire.	X	Limited to mandated repertoire.		
Denmark	KODA	X				X					
Finland	TEOSTO	X				X					
France	SACEM	X				X					
Germany	GEMA	X		X		X	Limited to mandated repertoire.				

⁶⁰ ANNEXES I and II of this report are not covered by the Creative Commons 4.0 licence and the commercial use, modification and transformation of their content are reserved.

Greece	AEPI	X		X		X	Limited to mandated repertoire.	X	Limited to mandated repertoire.		
Hungary	ARTISIUS	X		X		X	Limited to mandated repertoire.	X	Limited to mandated repertoire.		
Iceland	STEF	X		X		X					
Ireland	IMRO	X				X	Limited to mandated repertoire		Limited to mandated repertoire		
Italy	SIAE	X				X					
Latvia	AKKA/LAA	X		X		X	Limited to mandated repertoire.	X	Limited to mandated repertoire.		
Lithuania	LATGA	X		X		X	Limited to mandated repertoire.	X	Limited to mandated repertoire		
Luxembourg	SACEM Luxembourg	X				X					
Norway	TONO	X				X					
Poland	ZAIS	X		X	Limited by the consent of rights holders and the scope of collective management	X	Limited to mandated repertoire.				
Portugal	SPA	X		X		X	Limited to mandated repertoire.	X	Limited to mandated repertoire.	X	
Romania	UCMR-ADA	X									
Slovakia	SOZA	X		X		X	Limited to mandated repertoire.				
Spain	SGAE	X		X		X	Limited to mandated repertoire.	X	Limited to mandated repertoire.		

Sweden	STIM	X		X		X	Limited to mandated repertoire (possibly an ECL)	X	Limited to mandated repertoire	X	
Switzerland	SUISA	X				X					
The Netherlands	BUMA-STEMRA	X		X	Location limited to indicating if RH is member of a CMO and if so which one	X	Limited to mandated repertoire	X As of 2016	Limited to mandated repertoire	X	www.voice-info.nl
UK	PRS for Music	X		X		X	Limited to mandated repertoire	X	Limited to mandated repertoire	X	