



## **EuropeanaPhotography IPR workshop Paris, November 14 & 15, 2003.**

The EuropeanaPhotographic IPR workshop, organized by Parisienne de Photographie took place in Paris on November 14 & 15. 13 members of the EuropeanaPhotography consortium attended the workshop as well as members of the Parisienne de Photography staff, a French representative from the Daguerreobase project ( a Europeana feeder project specialized on daguerreotypes), Dimitrios Tsolis from the University of Patras, EP's subcontractor on WP6 and Julia Fallon, IPR & policy adviser of the Europeana Foundation. The attendance list is attached.

### **Day 1: November 14**

**The first day's morning** was dedicated to a **general presentation of the IPR legal environment in Europe and in the USA** by Angelina Petrovic, a paralegal consultant & an experienced specialist of IPR related to photography (12 years with Corbis-Syigma). The session focused on defining the various rights attached to a photographic image, first the creator's (photographer's) rights, and then various third party rights, attached either to the artifacts represented on the photographic image (work of art, piece of architecture or design, elements of a private property, trademarks or logos) or to the persons represented on the photographic image (personality & privacy rights).

The complete presentation has been uploaded to the Project repository. However, as different legal systems carry different approaches of IPR – mainly, distinction between common law based systems (such as US or UK) which focus on economic rights eg copyright, and civil law systems (France, Italy, Spain), which have a broader definition including moral rights of the creator, participants are invited to seek local legal advice to understand their specific constraints.

**The afternoon session was dedicated to practical cases**, based on questions & images submitted by the participants. Examples of the questions have also been uploaded to the repository.

Expert advice was given to the participants by Angelina Petrovic and her colleague Stefan Biberfeld, a specialized IP lawyer who acted as Corbis European's chief counsel for over 10 years.

The participants reached the conclusion that as images digitized within the framework of the project tend to bear multiple "layers" of rights, which themselves vary depending on the various countries, it is close to impossible to make sure all rights have been covered / appropriate permissions have been obtained for publication on Europeana. As the content providers have agreed to guarantee all rights to the portal, the most pragmatic approach is for each partner to establish a risk minimization strategy in order to ensure that the cost/benefit ratio of publishing the images on Europeana remains in their favor.

These strategies may vary according to the end goal of each provider, especially with their economic model (commercial vs cultural). However, certain common approaches were discussed as follows and are summarized hereafter - with no guarantee, implied or otherwise as to their success (!!!).

## A (VERY BRIEF) RISK MANAGEMENT GUIDE FOR DISPLAYING IMAGES ON EUROPEANA

- Comply with **your local law in priority**: although publication on Europeana reaches an international audience and multiple legal systems apply, chances are that any potential infringement by an image provider will be challenged / tried on the provider's territory first. For example, if you are in a civil law country, you should address moral rights of the author as well as copyright issues. If there is no right attached to, say, architecture, or fashion design in your country, securing these may not be a priority... etc...
- Try and obtain **as many permissions from third parties** as you can to publish the content on Europeana : in particular, participants gathering images from various sources should obtain from those sources permissions / licenses similar to the one they are granting to Europeana.
- Focus on photographer's **copyright** issues and the **main moral rights** (paternity, integrity of the work) if appropriate on your territory. Based on the date & type of images to be contributed to Europeana, as well as the type of use (editorial rather than commercial), third party rights are less likely to be an issue, except for some identified artists or estates (examples were discussed on Le Corbusier, Picasso, Brigitte Bardot <sup>1</sup>).
- Have **legal issues in mind when selecting images**: always select the image with the highest historical / informational value based on the project's goals, as this may be taken into consideration in case of a legal dispute. For example : an image showing a wide view of the 1900 world exhibition in Paris (including people, various objects exhibited, etc...) should be preferred to an individual view of a work of art, be it displayed in the same exhibition.
- **Orphan works** (eg, works with no known author or right holder) will be a significant portion of the images displayed by the consortium: based on the IPR survey, they represent 1/5 of the content. Although legislation on Orphan Works is yet to be implemented at the level of the member states, a directive has been published by the Union and could be used as a guideline for publication of such. In essence, participants should undertake and document **a diligent search** (as defined in the EU directive, uploaded in the repository <sup>2</sup>) prior to publishing any orphan work on Europeana. Such search to include posting a notice on their website to encourage right-holders to come forward. A similar initiative could be discussed with Europeana at the portal's level.
- When you do not have an author's name, try and **determine whether the image is in the public domain**. You may, using your country's demographic tables, calculate statistical chances that a work is in the public domain based on its real or estimated date. In France for example, works until 1895 are likely to be in the public domain as the average life expectancy of a hypothetical 20 years old photographer is less than 47 years eg his statistical date of death would be prior to 1942. This approach does not give absolute certainty but, when followed consistently, might be useful in challenging an infringement accusation.
- **Anticipate economic consequences of possible infringements**: in keeping with the spirit of the Orphan Works directive – but also as good business practice – participants may set up a reserve fund to face justified demands for compensation from right-holders. This can take the form of a sum kept in escrow (KU Leuven) , a provision in the company accounts (Parisienne) or any other form of financial reserve, with an amount commensurate to the level of risk perceived, especially with regards to anticipated uses of the images (for example, whether they will be licensed for editorial or commercial use out of Europeana, etc....).

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<sup>1</sup> A guide to image rights & third party rights in Europe has been published a few years ago by CEPIC and will be circulated to the consortium members shortly.

<sup>2</sup> Each participant should keep up with any legislative initiative on Orphan Works in their territory and keep the consortium informed.

## **Day 2 : November 15**

The second half-day was dedicated to a discussion of the licensing models, with a focus on the Public Domain Mark, which appeared as one of the major issues for participants during the Athens meeting in March 2013, and was the subject of a letter addressed to Europeana following the Vilnius meeting in September. A short discussion also took place on the use of images on social networks.

**Julia Fallon, PR policy adviser at Europeana Foundation presented the current state of the Foundation's thinking on IPR & licensing models**, in order to encourage Europeana content providers to improve the accuracy of the labeling of their images whilst making their data as accessible as possible for reuse by the general public.

Julia introduced a set of recommendations which may be implemented after internal review by Europeana's stakeholders. Among these recommendations, several could be relevant to the project <sup>3</sup>. Julia's full presentation has been uploaded to the project repository.

Some of the recommendations seeking to set a high quality standard for the previews (minimum size if the image, no watermark) were viewed as problematic by some of the consortium members should they become mandatory instead of simple guidelines.

The participants have also been seeking guidance as to **the labeling of any Orphan work** being part of their content ingested into Europeana. <sup>4</sup> Since Orphan Works are yet to be defined in law, two options might be explored:

- Use the "unknown " right status, expecting to convert to a future Orphan Works label when created;
- Apply a Right Reserved license, so that potential users may be advised by the content holder that the right status of the work is still unclear.

The European directive on Orphan works is available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

**Next, Dimitrios Tsolis of the University of Patras presented the results of the IPR survey** undertaken among EuropeanaPhotography's content providers in order to assess the nature of their holdings and their strategies with regards to licensing. The full results of the survey have been published as part of the WP6 deliverable / IPR guidebook.

Unsurprisingly, the survey established that both Orphan works and Public Domain works were a significant portion of the material anticipated to be released to Europeana : each represent about 20% of the content, the 60% remaining being mostly copyrighted.

A majority (over 60%) of the participants intend to use Rights Reserved Europeana Licenses for their copyrighted content with Creative Commons licenses being next.

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<sup>3</sup> Europeana will provide a summary paper on how the recommendations might help EuropeanaPhotography providers to accurately label their content & make them available on the portal.

<sup>4</sup> Awaiting guidance from Europeana on how best to deal with Orphan works from a labeling perspective

More surprisingly, for Public Domain material, only 20% of participants intend to use the Public Domain Mark, the other users favoring RR licenses and CC licenses, most of which banning commercial use. In addition, some users using the PDM will implement devices limiting reuse from their own websites, such as display of low resolution images or watermarked images.

This figure is in fact similar to the general statistics of all images displayed on the Europeana portal as described by Julia earlier in the discussion. The participants therefore believe that the reluctance to use the PDM is shared by other Europeana providers and that solving it would be beneficial for all as it may induce all providers to label more accurately their content.

**This reluctance has been already conveyed to the Europeana Foundation and originates from what is perceived by the members of the EuropeanaPhotography consortium as an ambiguous and maximalist definition of Public Domain in the digital age which was already pointed out in Athens.**

Although this "open data" advocacy is acknowledged as a legitimate goal for Europeana, its practical applications are a threat to the providers' economic models, both commercial archives and public institutions who are more and more encouraged – and sometimes, legally mandated – to generate revenue & charge for their services.

We may summarize the ongoing debate as follows – the arguments were discussed at length during the meeting:

- **Europeana's view, as conveyed by the PDM description and other guidelines is that digital copies of Public Domain Works should be made available for free to the general public**, in a sufficient definition and with no alteration (eg visible watermarks) to allow unrestricted reuse including commercial. The PDM mark seeks to identify such works to permit potential users to identify them, and potentially "harvest" them using appropriate technology. Although no current provider on Europeana complies fully with this policy - which would ideally imply making the high resolution images available for free – some of them are getting close to implementing a version of it : making good digital reproductions, although not the highest resolution, available for all uses.
- **On the other hand, EuropeanaPhotography contributors seek to control the reuse of the digital copies** they produced of the Public Domain images in their collections, which is usually achieved by a combination of restricted access to the higher resolution images, and restrictive terms of use posted on their websites. Whilst EP contributors will commit to inform the public of the correct legal status of the work to the best of their knowledge (none of us wish to commit copyfraud!), they insist on setting their own terms for reuse of the digital files they produced, including charging users, not for the rights, but for the service in providing the images to them. In effect, some of us may accept making low or medium resolution images available for free to the general public for reuse, whilst some participants may accept it only for non commercial uses, and other may ban it completely. The PDM as it is now is perceived as a threat and, until a reasonable middle-ground is found, many providers may take (or have already taken) the most protective approach with regards to right statements and availability of the digital images (size & watermark).

The two points of view were stated and although the discussion did not yield any firm conclusion, the parties showed willingness to collaborate and explore potential solutions.

Our (EP's) suggestions would be as follows:

- Long term: the license terms should ultimately disconnect the right status of the object and the access / reuse status of the file. In effect, this could result in the creation of a new right statement (something like: public domain / restricted access) in addition to the PDM and the CC0 licenses.
- Short term: Europeana could clarify the significance of the Public Domain Mark by stating that, whilst the original object is in the public domain, the provider of the file may set his own (non copyright based) conditions for reuse of the file he has produced.
- Another suggestion – which would address the provider's concerns in the short term and wouldn't require a change to Europeana's current licensing models, would be to authorize EuropeanaPhotography providers to declare the public domain status of the object, not by using the PDM, but by posting the information in the rights section of the metadata, and use the Europeana Rights field to express conditions of reuse of the files themselves. This would allow those providers wishing to make the medium resolution images accessible & reusable to apply any type of CC licenses they might deem appropriate.

Finally, **there was a short discussion on the use on social media of the images posted on Europeana**, and the contradiction between the providers' objective to control reuse of their content and the extremely wide licensing terms granted to social media under their terms of use.

Europeana's policy is NOT to post any Europeana image on social media except if they bear the PDM, or CC0 licenses (this is to be considered when making the images available under such right labels), or if expressly allowed to do so by the content providers. However, no restriction on posting on social media is conveyed to the public in the Europeana terms of use, which might be an issue from the content providers' point of view since the general public usually considers it private use eg exempt from copyright.

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The meeting ended with a discussion of the final exhibition project, which was presented by Fred Truyen.

UPLOADED TO THE PROJECT REPOSITORY:

Final Agenda + attendance list

IPR document by Angelina Petrovic

Participant's questions

EU Directive on Orphan Works

Julia Fallon's presentation: recommendations for labeling & displaying content on Europeana