

Europeana Sounds and Copyrights:

The Need for and Challenges in Licensing Archival Materials

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Author: Dr. Simone Schroff

Institute for Information Law, University of Amsterdam



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How can cultural heritage institutions tackle the barriers to online access within the EU, and what policy recommendation at EU and institutional level can be made to bring down the barriers?

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Executive Summary

The Europeana Sounds project was started in 2014 to facilitate the making available of audio-visual material online via the Europeana gateway. Even though a significant proportion of the archival material in question is comparatively old, cultural heritage institutions have identified copyright-related issues as one of the main barriers to providing online access to their materials. As a result, this report identifies and clarifies the scope of the copyright-related challenges in the context of Europeana Sounds and provides guidelines as to how these can be overcome in theory and practice.

To understand the scope of the copyright-related concerns involved, this report relies on the analysis of EU law. As EU copyright law has not been fully harmonised at this point, it additionally draws on the legal provisions in Germany and the UK to illustrate the extent of possible variation across member states. Furthermore, the report sets the operation of copyright in the context of current industry structure, combining the theoretical and the practical operation of copyright systems. Based on this, the potential licensing options and strategies are discussed, including their strengths and weaknesses. The result is a series of recommendations which highlight areas where the process needs to be improved and streamlined.

In the first section, the focus is on the nature of archival material as relevant in the context of Europeana Sounds from a copyright and related rights point of view. The report provides specific guidance into how the relevant copyright and neighbouring rights can be identified. The approach chosen here is broader than usual as it does not only cover sounds but also accompanying materials, for example booklets, manuscripts and films. The main finding is the layering of rights in any archival item, each layer with a different right holder. For example, a CD with music contains distinct copyrights, namely the composition and lyrics, as well as related rights, in particular the performance and the phonogram. The booklet includes literature works as well as art works.

Having said this, determining what works are involved and who owns them is highly complex and the answer can vary across member states for a number of reasons. While EU law names which types of works are protected, the actual definitions are not harmonised. Furthermore, the originality standard established at EU level is not absolute. It is up to member states' courts to determine borderline cases. This means in practice that a work which is protected in member state A may not benefit from protection in member state B. Copyright ownership rules also differ across the EU, for example when a work was made in the context of employment. The cross-member state variation in turn provides for significant challenges in licensing works Europe-wide. As a result, the report explicitly analyses borderline cases to illustrate the extent of likely variation.

While variation persists in the copyright provision of EU member states, the European cultural sectors have developed a set of common practices. In essence, copyright law only lays the basis for copyright ownership: rights are commonly transferred in practice. In general, the commercial exploitation of copyright works has the practical effect of concentrating the rights into fewer hands. However, the extent is limited, depending on the specific cultural sector in question. For example, the rights in a recorded musical performance are usually divided: while the music publisher is likely to hold the rights in the musical composition and lyrics, the performance and the

phonogram are most likely owned by a record label. Record labels will also often own at least some of the rights in the accompanying materials, such as the booklet.

The report furthermore highlights that clearing the works from a copyright perspective may not necessarily be sufficient to make them available online. The content of material may raise ethical issues which need to be considered beforehand. This would for example be the case if interviews on culturally sensitive issues were made for research purposes with no intent of further distribution at the time. The report recommends to contact the participants and the affected cultural community to assess the challenges and where necessary, acquire permission.

Based on the analysis of relevant rights in a particular digital object and their likely ownership in theory and practice, the second part focuses on acquiring permissions and licensing practices. Under EU law, cultural heritage institutions need permission to reproduce works and make them available online. There are currently no exceptions on which cultural heritage institutions could rely in the context of Europeana Sounds. They therefore have to seek permission from the copyright holder. This requirement applies to all copyright works and related rights contained in each digital object that they wish to contribute to Europeana Sounds.

This need for permissions has been traditionally handled by collective management organisations which specialise in the licensing of works to a large variety of users. However, this system in its current form is not a sufficient answer in the context of Europeana Sounds. Problems arise in several areas. First, not only does the coverage of collective management arrangements vary significantly across different types of works, the system of reciprocal agreements among collective management organisations which allows them to license the world-wide repertoire does not usually extend to online exploitation across borders. In other words, it is not possible to get a license from the local organisation which would cover at least Europe-wide access for all the works an institutions wants to contribute to Europeana Sounds. Secondly, much of the archival material was never in commercial circulation. As a result, commercial licensing structures such as the collective management system are unlikely to provide sufficient support in this area. Thirdly, right holders are free to withdraw their online rights from the collective management in the case of music. This means that rights in the online environment are especially fragmented. Even if an author has his works managed by a collective management organisation, this does not necessarily entail the required making available right. Determining these limitations in practice is a major challenge in itself. All of these issues in combination mean that collective management organisations are unlikely to be able to provide the required multi-territorial licenses for all of the works licenses are sought for. As a result, alternative options have to be considered.

The focus then shifts to the available licensing options and how these can be combined. In particular, it discusses the existing collective management system; the rights concentration as a result of industry practices in the hands of commercial intermediaries; contacting individual authors directly; and other legal options. However, rather than treating them as alternatives, they are seen here as complementary- with the aim of licensing all works in question. The report first establishes that contacting a collective management organisation is still the most valid starting point, despite the issues the current system faces. In a second step then, the report recommends to exploit the concentration of rights in the hands of commercial intermediaries, for example publishers and record labels, by contacting them directly. Thirdly, for works not licensed at this stage, the individual right holder should be contacted, for example the author. For some works not successfully cleared at this

point, the Orphan Works Directive can be relied upon. However, even if all of these steps are taken, it is unlikely that all works held by cultural heritage institutions in their archives will be successfully cleared. Reasons include gaps in the Orphan Works Directive as well as its very costly diligent search requirement.

Finally, even if licenses are available, Europe's cultural heritage can only be made available online on a large scale if their associated costs are affordable. While remuneration should be paid to right holders, the licensing fees need to be set in context. On one hand, variation between member states in terms of income need to be considered. On the other hand, the purpose of Europeana Sounds needs to be taken into account. Existing tariffs for online exploitation are mainly commercial in nature and usually calculated taking into account the traffic and income a particular use generates. However, cultural heritage institutions are not commercial providers seeking profit. Instead, they follow a public interest mission supported by public funds. The use is essentially non-commercial, following a cultural policy which is confirmed as important at both the member state and EU level. This difference should be taken into account and be reflected in the pricing. Cultural heritage institutions would otherwise be punished by higher costs for their contribution to a successful cultural policy.

Based on the analysis of the current copyright and licensing system within the EU, the report makes a set of recommendations designed to facilitate the process.

- Recommendation 1: further harmonise the definition of works and originality.
- Recommendation 2: establish a comprehensive, publicly accessible register of European collective management organisations and major right holders which includes information on the work types, rights and ownership they cover.
- Recommendation 3: the legislator needs to provide legal certainty for cultural heritage institutions against infringement claims if they have complied with national law.
- Recommendation 4: collective management organisations should provide cultural heritage institutions with comprehensive access to relevant databases, in particular CIS-Net.
- Recommendation 5: collective management organisations need to coordinate their licensing practices and conditions.
- Recommendation 6: cultural heritage institutions should contact affected communities when digital objects pose ethical issues.
- Recommendation 7: cultural heritage institutions need to document all right holder information in an openly accessible format.

1. Introduction

In 2008, the European Commission launched Europeana as a common gateway for Europe's cultural heritage online. Its objective is to support cultural heritage institutions (CHIs) in the process of digitizing their archives and making them available online as part of the Europeana Sounds project. The archives are to become more accessible and usable on a European scale, providing cultural and economic benefits as a result. Since 2014, the separate project Europeana Sounds has been in place to facilitate the delivery of sound-related archival material to Europeana by data providers, most commonly CHIs in Europe. However, these institutions face copyright-related issues. This report aims to not only identify, analyse and clarify the scope of the challenges in the context of Europeana Sounds, but also provide guidelines as to how the challenges can be overcome in theory and practice.

Europeana Sounds aims to provide a shared gateway for musical works and related documents that are held by contributing CHIs. These institutions digitise their existing analogue archives and make them available online. Although the media in question is comparatively old in many cases, this does not mean that they are out of copyright protection. Copyright restricts what a user can do with a copyrighted work until the protection expires, unless an exception applies. In particular, EU law, which has been implemented in all member states, restricts among other things the copying (reproduction) and dissemination (here making available online) of items without the consent of the copyright owner. As a result, the activities required to make Europe's cultural heritage available online are affected by current copyright law. In the absence of applicable exceptions, institutions will require licenses from the copyright owners to carry these activities out legally. This process however is far from straightforward.

The first complicating factor is the very broad nature of the archival materials in question. It includes different types of music, ranging from folk music to jazz to pop music. The archives also contain other types of spoken words such as poems, news items, interviews, documentaries or debates as well as oral histories, samples of dialects and minority languages or ancient myths, too. Furthermore, some of the sounds are not human but instead are recordings of nature such as animal voices, the weather or water. Moreover, these sounds are recorded in different formats, including cylinders, LPs and CDs, broadcasts (radio and TV) or as audio-visual works. The visual material includes, for example, traditional dances, stage performances and a range of other films. In addition to sound materials, there are a variety of related documents. These are not only booklets and cover art that accompany sound recordings or audio-visual works but also original musical scores, personal archives, magazine articles, opinion pieces, photographs and other art works.

In addition to this large variety in nature, the materials were created for different purposes. Some represent commercially exploited items which have been published and widely bought and sold. Others however have been available to the public or researchers in archives but they were never intended to be used commercially. For example, they may be the result of research or archiving efforts. Finally, some materials are at this stage unpublished, for example manuscript scores or the personal letters of individuals. In other words, some of these items were never intended for a broader audience and making them available online poses specific problems both in terms of copyright as well as in an ethical sense, especially if the content is culturally sensitive.

Finally, the complexity is further amplified by the limited harmonisation of relevant issues at the European level. By making their objects available online at least EU-wide, institutions need to acquire multi-territorial licenses. Otherwise, the access would be restricted to some member states,

falling short of Europeana's aim to make European heritage available to all. However, copyright is essentially territorial in nature with variation in the rules across member states as copyright within the EU is not awarded as a single, Europe-wide title. This means that differences in how copyright operates between member states have to be taken into account as well.

1.1 Objectives

This report explores the challenges that institutions participating in Europeana Sounds face in their efforts to make their archives available online. In addition, it aims to outline solutions to these issues and make recommendations on how the process could be facilitated at the EU and the institutional level. The challenges fall into two broad areas. First, given the large variety of materials that are due to be digitized and made available on Europeana Sounds, how do these relate to copyright? In particular, what kind of copyright works are affected and who owns the rights in these and for how long.¹ Secondly, if works are still in copyright and no exceptions apply, how can member institutions acquire licenses for their activities? This raises the question of how copyrights are commonly transferred and managed in practice. It also includes the licensing process and the challenges it poses. The main audience of this report are the European CHIs involved in Europeana Sounds. This report seeks to facilitate their understanding of the issues involved and help them clear the relevant hurdles.

The focus will be on copyright-related challenges but ethical issues will be discussed where relevant. However, it will not discuss the issue of moral rights,² meta-data or the diligent search for and use of orphan works in detail.

1.2 Methodology

This report relies on the doctrinal comparative analysis of legal provisions and case law. Like all laws, copyright is essentially a reflection of the political and cultural dynamics within a member state, mirroring its traditions and preferences. In the context of limited EU-wide harmonization, key differences remain, making it difficult to issue one guideline as to what action is necessary to overcome copyright hurdles. This is especially relevant in the context of the limited attention from EU law makers that copyright management at received at EU level so far.³ Nonetheless, the scope of

¹ The question of the term of protection in the context of Europeana has been discussed extensively in the past. The reader is therefore referred back to this report: C. Angelopoulos and C. Jasserand, 'Public Domain Calculator- Report and Documentation', *Europeana Connect*, 2011 (<http://archive.outofcopyright.eu/research/Public%20Domain%20Calculator%20-%20Report%20and%20Documentation.pdf>, last accessed 6/11/15).

² A discussion of moral rights is beyond the scope of this report. The issue has been discussed in the context of CHIs by J. Canat, L. Guibault and E. Logeais, 'Study on Copyright Limitations and Exceptions for Museums', *WIPO Standing Committee on Copyright and Related Rights: Geneva June 29-3 2015* (<http://www.ivir.nl/publicaties/download/1582>, last accessed 6/11/15) and M. Salokannel, A. Strowel and E. Derclaye, 'Final Report on Study contract concerning moral rights in the context of the exploitation of works through digital technology (ETD/99/B5-3000/E/28)' (http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf, last accessed 6/11/15).

³ The one major exception is the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Directive 2014/26/EU) (CMO Directive) which sets minimum standards in terms of transparency and activities.

differences within the EU can be gaged by relying on copyright legal traditions. There are two legal traditions in relation to European copyright: civil law and common law. Covering these will provide some insight into how member states are likely to differ. For this reason, EU law will be supplemented here with a comparative analysis based on the civil law country Germany and the common law member state UK.⁴

In addition, not all challenges faced by Europe's cultural heritage institutions are necessarily legal in nature. In particular, the effect of legal provisions is dependent on the context in which they are used. The licensing process especially is fundamentally affected by industry arrangements and the cooperation between stakeholders. As a result, this report will set the legal analysis in an industry context and provide empirical data where this is relevant. Finally, the empirical and doctrinal analysis is supplemented by normative contributions based on the analysis' results. These focus in particular on how the licensing process can be facilitated.

1.3 Outline

This report is divided into three distinct parts. In the first part, the legal background, focusing on copyright provisions, is discussed. The archival material held by institutions participating in Europeana Sounds is contextualised in terms of copyright. In addition, the ownership of rights, including transitional provisions, are examined in detail. In the second part then, the focus moves towards the licensing process and the specific challenges it poses for the licensee. The analysis includes licensing via Collective Management Organisations (CMOs) and intermediaries as well as materials which have never been commercially exploited.⁵ Finally, the third section will make specific recommendations to facilitate the process as it currently works, both at EU and institutional level.

⁴ This discussion is based on the main and adjunct acts in each country as well as case law. UK: 1911, 1956 Copyright Acts. 1988 Copyright Designs and Patents Act. Germany: 1901 Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst (LUG), 1907 Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie (KUG) and 1965 Urheberrechtsgesetz (UrhG).

⁵ See section 4 Licensing Works, in particular 4.3 Licensing Works in Practice.

2. Background

It is commonly said that a book or a CD is under copyright protection. However, using this everyday terminology is not accurate in the sense that it is neither the book nor the CD that is actually protected. Similarly the kind of activities covered by copyright are limited- not every copy made is necessarily also copyright infringement. It is therefore necessary to take a step back and clarify what we mean when we say that something is under copyright. This section will provide the general legal background to licensing in the context of Europeana Sounds. It will in particular clarify what copyright protects (work types and subject matter protected by neighbouring rights), the activities covered by copyright (exclusive rights) and finally ownership. The aim is to provide an overview of copyright and therefore lay the foundation for the more detailed discussions in later sections. The discussion will start with what we mean when we talk about 'works', outlining what types there are and why they are not the same as a physical medium. In the second part then, the discussion moves on to the kinds of behaviour that copyright restricts, also called the exclusive rights. This section will also briefly outline the two major boundaries of protection: the term of protection and permitted uses. Finally, the ownership of the rights will be outlined in theory and in practice.

2.1 What is the object of protection?

Copyright law focuses on the protection of 'works', rather than protect the physical item as such. There are two basic types of copyright-related protection: copyright and neighbouring rights.⁶ For copyright works, the focus is on the 'work' embodied within the copy. It protects the original expression of the author- the way he articulated an idea (as opposed to the idea as such). For example, the song 'Mamma Mia' by ABBA was written by Benny Andersson, Björn Ulvaeus and Stig Andersson. The melody and the lyrics are considered their original expression and therefore copyright works. As originality is the threshold to be classified as a copyright work, it is necessary to evaluate this term in more detail.

Originality has been first defined at EU level in the Software Directive as 'the author's own intellectual creation'.⁷ This definition has since been interpreted by the Court of Justice of the European Union (CJEU), the EU's highest court in the area of interpreting EU law.⁸ It has elaborated in *Infopaq*:

*'it is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve as a result an intellectual creation.'*⁹

In other words, a work is considered original if it reflects the creative choices an author has exercised when he created the work. It should be noted at this point that only those components which are not

⁶ In common law countries, both are considered copyrights. However, given their different rationale for protection, the distinction will be maintained within this report. In addition, most EU member states are civil law countries and explicitly draw on this distinction. Nonetheless, the case studies are taken from both groups.

⁷ Directive on the legal protection of computer programs (Directive 2009/24/EC), art. 1(3).

⁸ *Infopaq International A/S v Danske Dagblades Forening* (Case-05/08) [2009] OJ C 220/7; *Bezpečnostní softwarová asociace- Svaz softwarové ochrany v Ministerstvo kultury* (Case C-393/09) [2010] OJ C 63/8; see also M. Janssens, 'The Software Directive' in I. Stamatoudi and P. Torremans (eds.), *EU Copyright Law- A Commentary* (Cheltenham: Edward Elgar, 2014), p. 102.

⁹ *Infopaq International A/S v Danske Dagblades Forening* (Case-05/08), para. 45.

determined by the technical function count towards the level of originality.¹⁰ According to the CJEU, this understanding of originality applies to all copyright works covered in the InfoSoc Directive.¹¹ This has been confirmed explicitly in later cases, especially *Softwarová*.¹²

Applying this standard is up to the member states' courts though. As a result, member states do interpret this measure in the context of their own case law. In particular, they may use their traditional terminology when assessing originality, giving rise to variation even if the same originality threshold is applied. In addition, the definition provided by CJEU leaves some leeway for variation. The archival materials held by institutions participating in *Europeana Sounds* include some less common materials, for example oral histories. In these cases, it is more likely that the traditional differences in how originality is understood leads to differing results than it would be for established works such as a musical composition. In general, EU member states follow two distinct legal philosophies in this respect. The UK, Ireland and Malta have common law legal systems which emphasise labour and skill as a measure for originality. However, civil law countries, such as Germany or France, interpret originality more as creativity.¹³ As a result, a work considered as sufficiently original in the UK because the author spent time and effort on it may fail to qualify in Germany. If a work does not meet the originality threshold, it is considered to be in the public domain and therefore not subject to copyright protection.

The second group are the neighbouring rights. Here, the protection does not focus on the original expression of an author. Instead, persons involved in the exploitation of a work are granted protection to safeguard their effort and investment. Going back to ABBA's song, the song was recorded on an LP to exploit it commercially. To make the recording, the song has to be performed in the studio. In our example, it is all members of ABBA that contributed to the recording, either by playing an instrument or by singing. For this effort, they gain protection as performers under a distinct neighbouring right. In addition, finding artists and making records as well as advertising and distributing them is an expensive business. To ensure persons would be willing to take the risk, the phonogram or sound recording gained protection. However, since the recording is not original but rather related to labour and investment, it is also considered a neighbouring right and not granted to the artist but the record producer. The producers of *Mamma Mia* are Benny Andersson and Björn Ulvaeus. There are more neighbouring rights, for example broadcasts.

¹⁰ *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* (Case C-393/09), para. 48.

¹¹ *Infopaq International A/S v Danske Dagblades Forening* (Case-05/08), para. 36.

¹² *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* (Case C-393/09), para. 45.

¹³ For a detailed discussion on the issue, see G. Davies, 'The Convergence of Copyright and Author's Rights-Reality or Chimera?', *International Review of Intellectual Property and Competition Law*, 1995, Vol. 26, pp. 964-980; G. Davies, *Copyright and the Public Interest* (London: Sweet & Maxwell, 2002, 2nd ed.); J. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', *Tulane Law Review*, 1990, Vol. 64: 5, pp. 991-1031; A. Littoz-Monnet, 'Copyright in the EU: Droit D'Auteur or Right to Copy?', *Journal of European Public Policy*, 2006, Vol. 13: 3, pp. 438-455. R. Monta, 'The Concept of "Copyright" versus the "Droit D'Auteur"', *Southern California Law Review*, 1958, Vol. 32, pp. 177- 186; S. von Lewinski, *International Copyright Law and Policy* (Oxford: Oxford University Press, 2008); S. Schroff, *The Evolution of Copyright Policies (1880-2010) A Comparison between Germany, the UK, the US and the International Level* [PhD] (available at <https://ueaeprints.uea.ac.uk/49708/PhD>, last accessed 21/7/15), pp. 30-36.

All objects, irrespective if they are copyright works or subject matter protected by neighbouring rights, share that they have to be made perceptible to the senses (civil law countries) or be fixed in a tangible medium (common law countries).¹⁴ In both cases, the requirement essentially means that the underlying idea or investment reflected in the object has to be sufficiently clear to be identifiable.

Secondly, the subject matter has to fall within a definition of a work type or a related right.¹⁵ Protection is only provided to specific types of works and related rights which are defined in the legislation.¹⁶ If the subject matter does not fall within one of these categories, no protection is provided. In other words, the item is in the public domain. In this respect, the definitions and their boundaries are important because they determine if the specific subject matter benefits from protection in the first place. Moreover, all further copyright-related provisions are tied to some extent on the classification of work types and related rights. For example, a particular exception may only be available to certain categories of copyright works but not others. It is therefore essential to classify a collection item correctly. In other words: assessing the subject matter correctly forms the foundation for a comprehensive assessment of all copyright relevant issues.

In summary, one physical medium can therefore contain more than one copyright-relevant subject matter. For example, a sound record of the Mamma Mia in fact includes several copyright and neighbouring rights, including the composition, the lyrics, the phonogram and the performance. While the basis for protection varies depending on the level of originality, they all share that they are perceptible to the human senses and fall within the definition of a work type or neighbouring right. This now raises the question that if material is protected under copyright law, what does this mean in practice? In other words, what kind of behaviours are restricted?

2.2 The Exclusive Rights

Each work and neighbouring right is given its own basket of restricted acts, best understood as specific uses of the protected subject matter that require the owner's permission to be carried out legally. In general, EU law provides for three distinct exploitation rights which are granted to all copyright works and subject matter protected by neighbouring rights discussed before: the right of reproduction, distribution and communication to the public.

The right of reproduction is defined as: *'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part [...]'*¹⁷ It covers the copying of protected subject matter, both permanent and temporary ones.¹⁸ In practice, a reproduction can be, for example, copying a protected copyright work by hand or using a photocopying machine. Two aspects merit attention.

¹⁴ M. van Eechoud, 'Along the Road to Uniformity- Diverse Readings of the Court of Justice Judgements on Copyright Work', *JIPITEC*, Vol. 3, No. 1, pp. 60-80, para. 81.

¹⁵ This is especially important in countries with closed list systems such as Ireland and the UK. M. van Eechoud, 'Along the Road to Uniformity- Diverse Readings of the Court of Justice Judgements on Copyright Work', para. 81.

¹⁶ The same applies to neighbouring rights, as later sections will show. Lists can be open-ended by providing examples or closed in which case only the items listed are covered.

¹⁷ Directive on the Harmonisation of Certain aspects of Copyright and Related Rights in the Information Society (Directive 2001/29/EC) (InfoSoc Directive), art. 2.

¹⁸ InfoSoc Directive, art. 2.

First, it is not required that the whole protected subject matter is copied. It is sufficient that the copy entails a substantial part. Imagine that a composer writes a song. If he uses the melody of another song, for example the chorus, this would most likely be considered a substantial part and the composer would commit infringement unless he acquires a license for his actions. Secondly, the right covers both permanent and temporary reproductions. A temporary reproduction is especially relevant in the context of digital uses. Whenever the protected subject matter is opened on a computer, a temporary copy of the work is made in the RAM. While there is a mandatory exception for technically necessary copies under EU law,¹⁹ it only applies to incidental copies in the context of lawful uses. In other words, if the user has a license to use the subject matter on the computer, this copy is not relevant for infringement. However, if the use itself is unlawful, the RAM copy is a copyright- relevant infringement.

The right of distribution and communication to the public focus on how the protected subject matter is used. A distribution is defined under EU law as: *'the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.'*²⁰ The key characteristic here is that the protected subject matter is sold as physical copies. For example, a musical work is sold as CDs. It should be noted here though that the right can be exhausted under the First Sale Doctrine. It means that the copyright holder can only control the first sale of the protected item, not further sales that the first buyer may carry out- as long as it is not the original copy of the protected subject matter, for example the manuscript. As a result of this rule, a book which can be sold on without infringing the copyright in the underlying literary work. The doctrine applies because the book is essentially a physical copy of the expression reflected in the literary work.

On the other hand, the right of communication to the public covers those uses of protected subject matter which do not involve a physical copy. It is defined as *'the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'*²¹ This includes any transmission of protected subject matter where the public is not present at the location where the transmission originates.²² As this explanation shows, the coverage is very broad. In practice, it includes such uses as broadcasting a film but also making protected subject matter available online by for example uploading it to a server or streaming it.

In summary, there are three broadly defined rights which apply to copyright works and subject matter protected by neighbouring rights that have been discussed in Part I. They cover the reproduction of the subject matter, the distribution of physical copies as well as the distribution of intangible copies. They are independent of each other and apply to each subject matter as understood under copyright law individually. Going back to our record of Mamma Mia, each of the subject matter categories identified before (composition, lyrics, phonogram and performance) benefits from each one of these rights in isolation of the other ones. Therefore, carrying out a restricted act would require permission from the relevant right holder of the affected right for each one of these subject matters.

¹⁹ InfoSoc Directive, art. 5(1).

²⁰ InfoSoc Directive, art. 4(1).

²¹ InfoSoc Directive, art. 3(1).

²² C. Geiger and F. Schön herr, 'The Information Society Directive' in I. Stamatoudi and P. Torremans (eds.), *EU Copyright Law- A Commentary* (Cheltenham: Edward Elgar, 2014), para. 11.17

It should be noted here that the exclusive rights are not absolute. First, the protection of subject matter is limited to a number of years. If the term of protection has expired, it is not necessary to get a license from the right holder anymore as the subject matter will have fallen into the public domain.²³ The exact term varies between work types and calculating it is very complex in practice. A detailed discussion is beyond this report, but there are calculators available to support this as well as a detailed report on the topic, both of which can be accessed at <http://outofcopyright.eu/>. Secondly, the exclusive rights are also limited by what is called ‘permitted uses’, a number of exceptions that apply for specific uses. These vary according to the type of protected subject matter and use in question as well as across countries. In practice, a project like Europeana Sounds does not fit into any of the exceptions available in the EU.²⁴ This means that the copyright provisions apply, unless the subject matter has fallen into the public domain. As a result, it is essential to understand who owns these exclusive rights, both in theory and in practice.

2.3 Ownership

The rules of copyright ownership vary between the original copyright works and neighbouring rights. Copyright works are subject to the so-called Creator Doctrine. This refers to the principle that ‘copyright vests in the “author” and that the “author” is the natural person who created the work.’²⁵ In other words, a natural person called the author has created the work and as a result is the beneficiary of copyright protection. EU law does not define who the author actually is and this therefore depends on the detailed provisions within the member states. In both the UK²⁶ and Germany²⁷, the author is understood to be the person whose original expression the work reflects. This is important because it largely excludes legal persons from being considered the creator of a work.²⁸

Neighbouring rights are neither subject to an originality threshold, nor do they commonly have an author. Neighbouring rights are essentially types of subject matter which are economically valuable. However, they do not represent creations in the sense defined by the CJEU: the author’s own intellectual creation. Rather, they represent the result of a technological process, such as recording a performance or broadcasting it. As a result, it is logical that the Creator Doctrine does also not apply. Instead, copyright law defines who the first owner of these neighbouring rights is, depending on the type of neighbouring right in question. For example, the rights in a phonogram belong by default to its producer.

²³ It should be noted that uses may be subject to perpetual moral rights in some member states but this issue is not covered in this report.

²⁴ See section 4 Licensing Requirements: Europeana in the Context of Copyright Law.

²⁵ J. Seignette, *Challenges to the Creator Doctrine- Authorship, Copyright Ownership and the Exploitation of Creative Works in The Netherlands, Germany and the United States* (Alphen aan den Rijn: Kluwer, 1994), p. 1.

²⁶ s.9(1) 1988 CDPA. Exceptions apply to computer-generated content and photographers which define the person making the arrangement necessary for the creation of the work (s.9(3) 1988 CDPA).

²⁷ § 7 1965 UrhG.

²⁸ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 7 para. 2; N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 4-10. The only exceptions are computer-generated works and certain photographs.

The ownership of rights is subject to copyright law, as described above. Copyright works belong to the author while the ownership of neighbouring rights is granted to its maker- in other words whoever has made the main investment, as defined by the law. However, these default rules only provide the basis for copyright ownership in practice. First, the default ownership rules are not absolute: if the subject matter was not created or made independently but on the behest of a third party, the ownership of the subject matter is affected. In addition, creative products, here in particular songs, are exploited on a commercial scale. The particular nature of the market also affects practical copyright ownership. These two factors will now be discussed in turn.

2.3.1 Rights Ownership in Special Circumstances

In reality, many works are made on behest of another party. Copyright ownership or the ability to exploit a work crucially depends on the circumstances in which they were created. There are three distinct circumstances that should be discussed in this context: works made in the course of employment; works made by public authorities (public works) and finally commissioned works.

There is no uniform set of contract rules applicable to copyright within the EU.²⁹ Rather, each member state tends to have provisions in its copyright act but these have not been currently harmonised at EU level. As a result, it is the national provisions that apply and these can vary significantly in practice from a legal viewpoint.

The following section will discuss each one in turn, highlighting the legal background using the illustrating examples of Germany and the UK. Given their different legal traditions, they are able to provide an insight into how the legal provisions can vary. It should be noted here that this part is theoretical. How the contractual rules are implemented in practice, will be discussed in later sections when the individual work types and their ownership are discussed in the context of industry arrangement. For now, it is sufficient to emphasise how employment, public works and commissioned works vary from the Creator Doctrine.

2.3.1.1 Subject Matter Created in the Course of Employment

In the UK, the copyright in the case of employment is automatically owned by the employer unless there is an agreement to the contrary.³⁰ To establish if object of protection was created in employment, three questions have to be answered: 1) if the author³¹ was in employment, 2) if the work was created in the course of that employment and finally 3) if there was a contract to the contrary.³² If an employment does match these criteria; and if the subject matter has been created as part of this contract has to be decided on the facts on a case to case basis. The key question is to what extent an employee was contracted to carry out duties which are relevant for the object of protection in question.³³ Finally, an agreement to the contrary must have been in existence *before*

²⁹ This is with the exception of performers' rental rights.

³⁰ s.11(2) and s.168 1988 CDPA. The creator remains the author but all of the economic rights belong to the employer.

³¹ It should be noted here that the term 'author' in the UK is broad, referring both to authors of original works as well as to the maker of neighbouring rights.

³² *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*, [1968] 2 Q.B. 497, at 498

³³ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-19.

the protected subject matter was created although it can be written, oral or implied.³⁴ As a general rule, if an object of protection was created in the course of employment, the employer owns the copyright/ related right.³⁵ However, even if the employer does not get the rights outright, depending on the terms of employment and contract, he may still have a claim to the protected subject matter exploitation at least to some extent.³⁶

The German provisions on copyright in employment are significantly different. German law only knows general employment rules for copyright works and considers copyright itself to be not transferable.³⁷ Under Germany's law, the author is always the creator and the copyright cannot be transferred. However, the employer can get the rights to exploit the work and this is explicitly recognised.³⁸ The exploitation rights are limited to those uses directly relevant for the employer- all other rights stay with the author. Most notably, this does not necessarily include the right to license the work further.³⁹ In general, 'course of employment' focuses on what is common in the sector and the exploitability of the work by the employer, rather than the place and time when it was created.⁴⁰ It should be noted here that an employee may be required to offer the work to the employer, even if it was not created within the course of employment.⁴¹ Nonetheless, the overall control an employer has over the work in question is narrower than in the UK.

In summary, UK provisions permit a transfer of copyright-related protection from the author to the employer if the work was made in the course of employment as a maximum solution. In addition, if the requirements are not fully met, there is still the minimum solution of having access to licensing of at least some of the exclusive rights. On the other hand, Germany does not permit for a full transfer of copyright. Instead, what the UK sees as the minimum solution is the maximum here: the employer gets access to some rights.

³⁴ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-26.

³⁵ s.11(2) 1988 CDPA.

³⁶ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-10.

³⁷ § 29(1) 1965 UrhG.

³⁸ § 43 1965 UrhG and see section on authorship in the context of employment. T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht- Kommentar*, § 43, para. 1.

³⁹ BGH GRUR 2011, 59 – *Lärmschutzwand*, para. 11-12 and 17-18; T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht- Kommentar*, § 43 para. 20. It is possible though that the scope may be extended over time if the new use is directly linked to the envisioned exploitation at the time of Employment. The term of the assignment also depends on the specifics of the employment.

⁴⁰ H. Ahlberg and H.-P. Götting, *Urheberrecht*, § 43, para. 6-7.

⁴¹ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht- Kommentar*, § 43 para. 9; There is some debate on the extent to this as there has not been a judicial decision on this issue yet. T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht- Kommentar*, § 43 para. 24.

2.3.1.2 Subject Matter Created by Public Authorities

A special situation of employment arises for protection subject matter created by public authorities in the course of their duties. In other words, the object of protection was created by an individual but its aim is closely tied to the public mission of the institution. Here, the variation is also significant between member states. On one hand, Germany negates copyright-related protection for subject matter created by public institutions. The question is therefore not who owns the copyright but if the subject matter is in the public domain. In the UK however, these objects of protection are subject to specific types of copyright, depending on who made the work.

Germany does not protect laws, measures and announcement-style works made by public authorities.⁴² The same applies to copyright works created by public authorities which were meant for public attention⁴³ as long as the source is provided and the integrity of the work is maintained.⁴⁴ Public authority in this respect means any authority that exercises a public function as opposed to a purely private one and the publications need to be generally applicable (rather than only internal).⁴⁵ These rules can also apply to neighbouring rights.⁴⁶ If a separate object of protection is included in its entirety in a one made by a public authority, either in the text, referenced or added in the appendix, then it is considered part of the subject created by the public authority and therefore not protected. This applies as long as the public authority is making the content part of its own content and the referenced rules have an external effect. It is not relevant in this context if the referenced rules are actually binding.⁴⁷

As any exception, the provisions have to be interpreted narrowly. In particular, the content has to be directly linked to a public authority. This is most likely the case if the subject matter originates from a public authority or was made under its direction.⁴⁸ For example, the object of protection would not be considered public if the author or maker was not an employee; or an employee was acting in private capacity and the activity was not coordinated or approved by the public authority.⁴⁹ It also does not negate the copyright in adaptations and collections of works which are made up of subject matter created by public authorities.⁵⁰ Finally, sui generis protected databases, print or digital, are also exempt.⁵¹

In the UK, there are three types of public works: Crown copyright, measures of the Church of England and Parliamentary copyright. A work made by Her Majesty or an officer of the Crown is protected by Crown copyright and the Queen is the first owner of the copyright.⁵² In general, normal copyright provisions apply to Crown copyright works, subject to a few exceptions as well as the term

⁴² §5 1965 UrhG.

⁴³ BGH GRUR 1988, 33– *Topographische Landeskarten*, at p. 35.

⁴⁴ § 5(2) 1965 UrhG.

⁴⁵ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 5 para. 5.

⁴⁶ OLG Dresden ZUM 2001, 595, at 597; BGH ZUM 1999, 638 – *Tele-Info-CD*.

⁴⁷ BGH GRUR 1990, 1003- *DIN-Normen*, at pp. 1003- 1004.

⁴⁸ BGH GRUR 1987, 166–*AOK-Merkblatt*, at p. 167.

⁴⁹ BGH GRUR 1992, 382 – *Leitsätze*, at 385-386.

⁵⁰ §§ 3 and 4 1965 UrhG as well as T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 5 para. 2.

⁵¹ OLG Dresden ZUM 2001, 595, at 597-598. These databases are protected under § 87a 1965 UrhG.

⁵² s.163(1)(b) 1988 CDPA. However, Crown copyright does not exist if Parliamentary copyright does; s.163(6) 1988 CDPA.

of protection.⁵³ In particular, the usual qualifications imposed on copyright in regard to author, country of publication or origin of a broadcast, do not apply.⁵⁴ This means that the scope of broadcasts is broader under Crown copyright than it is under the normal provisions because the threshold which has to be met to qualify for protection is lower. It should also be noted that Crown copyright status does not change even if the copyright is assigned to another person.⁵⁵ In practice, Crown copyright most likely applies to government publications of any kind.

Copyright in Parliamentary and Church of England Synod Acts and Measures⁵⁶ is considered a separate copyright. However, the rights are also owned by the Crown. It also applies to all Acts and Measures assented to before the CDPA took effect (1/8/1989).⁵⁷ The applicable rules are the same as for Crown copyright (see above) and therefore do not need to be discussed again. The third category of public work is Parliamentary Copyright. If a work is created under the direction of Parliament, the House in question (or both) is the first owner of the copyright.⁵⁸ It applies to any work made by a parliamentary employee well as films, live broadcasts, and sound recordings of the proceedings of the house.⁵⁹ It should be noted that this does not cover works which were only commissioned by Parliament⁶⁰ but it does apply to Bills once they have been introduced into parliament.⁶¹

In summary, Germany does not provide copyright-related protection to works created as part of an authority's public mission. In the UK, copyright prevails but depending on who employed the creator or maker, the rights are owned either by Crown, Parliament or the Church of England. The substantive rules in these cases are largely the same.

2.3.1.3 Commissioned Works

The third potential deviation from the Creator Doctrine and standard ownership rules is when a work is commissioned. Commissioning refers to a specific situation of creation: the commissioner requests another person to create a work for him and agrees to pay him in return. It is therefore only applicable to copyright and not neighbouring rights. First, commissioning a work requires a contract with an obligation to create a work and an obligation to pay for the creation. The agreement or the payment has been made before the work is created.

⁵³ s.163(5) 1988 CDPA.

⁵⁴ s.153(2) 1988 CDPA; N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 10-01 and 10-13. For example, if an officer is not resident or domiciled in a country to which the 1988 CDPA applies.

⁵⁵ s.163(2) 1988 CDPA.

⁵⁶ This also includes Acts and Measures by the devolved parliaments.

⁵⁷ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 10-21.

⁵⁸ s.165(4) 1988 CDPA.

⁵⁹ s.165(4) 1988 CDPA.

⁶⁰ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 10-79. In the case of Wales, the first owner is the National Assembly for Wales Commission, for Scottish parliamentary copyright it is the Scottish Parliamentary Corporate Body and For NI it is the Northern Ireland Assembly Commission.

⁶¹ s.166 1988 CDPA.

The key difference to works created in the course of employment is that the author owns the copyright in commissioned works. The rules that apply in Germany to commissioned works, are essentially the same as those that apply to a pre-existing work.⁶² In other words, employment rules do not apply and all economic rights have to be acquired via a contract or license. The situation is slightly different in the UK. Here, it is common practice that these works are subject to a contract which usually includes either explicitly or implied a clause that the copyright will be owned by the commissioner. The commissioner will usually at least have a claim to a license to use the work though.⁶³ The key difference therefore is that the commissioner in the UK is in a stronger position compared to Germany because the presumptions work in his favour.

2.3.1.4 Summary

In summary, the ownership of a protected subject matter depends on the specific situation in which it was created/ made and later exploited. The rights in original works, called copyright works, are owned by its creator and author. The ownership of neighbouring rights is defined by law. In addition to these general rules, if the object of protection was made in the course of employment, the copyright- related rights will be owned by the employer in the UK while the employer has some claim to relevant exploitation rights in Germany. However, if the employer is a public authority, no protection exists in Germany. For works made by royal officers or under the control of parliament, the Crown or Parliament is the owner in the UK. Furthermore, commissioned copyright works are generally subject to the Creator Doctrine. While this fully applies in Germany, there is a bias in the presumptions in the UK which provides the commissioner with some limited exploitation rights. The deviations can therefore be summarised as this:

⁶² T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, §43, para. 5.

⁶³ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-32.

	UK	Germany
Independent Creation	<ul style="list-style-type: none"> • Copyright works are owned by the author (Creator's Doctrine) • Ownership of neighbouring rights depends on the subject matter in question 	<ul style="list-style-type: none"> • Copyright works are owned by the author (Creator's Doctrine) • Ownership of neighbouring rights depends on the subject matter in question
Employment	<ul style="list-style-type: none"> • Employer owns the object of protection or at least all relevant economic rights 	<ul style="list-style-type: none"> • Employer does not own the copyright • Employer gets license for relevant economic rights
Public Works	<ul style="list-style-type: none"> • Copyright is owned by the Crown or Parliament 	<ul style="list-style-type: none"> • No copyright protection is provided
Commissioned Works	<ul style="list-style-type: none"> • Copyright is owned by author • Employer has limited claim to economic rights 	<ul style="list-style-type: none"> • Copyright is owned by the author

Table 1: Ownership of copyright and its economic rights in the context of works created at the behest of others.

Nonetheless, all of three of these deviations are subject to contractual rules. It should therefore be kept in mind that the contractual terms of employment allow for deviation from these default rules.

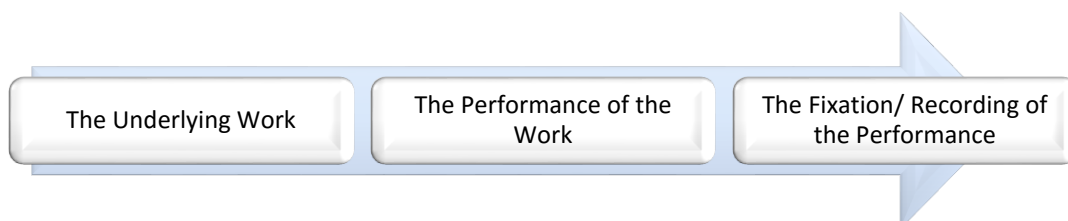
2.3.2 The Creative Market

In the previous section, it was described that there are default ownership rules which depend on the subject matter's context of creation and production. Based on these rules, the first owner of a copyright or neighbouring right can be determined. However, this is only half of the story. As the objects of protection are exploited commercially, the rights in them tend to be transferred. As a result, copyright ownership is not only determined by law but also by the market of creative goods. In fact, a common practice of copyright assignment and licensing has developed across Europe which tends to vary across sectorial lines.⁶⁴

We listen to and access protected subject matter every day, for example music. We buy our favourite songs in stores, online or listen to them on the radio. Our behaviour is among other things also a reflection of how music is a business venture. The music business focuses on three interrelated but essentially separate revenue streams: 1) the writing of a song; 2) the live performance of a song and 3) the recording of a song.⁶⁵ Each of them in essence represents another phase of exploiting works.

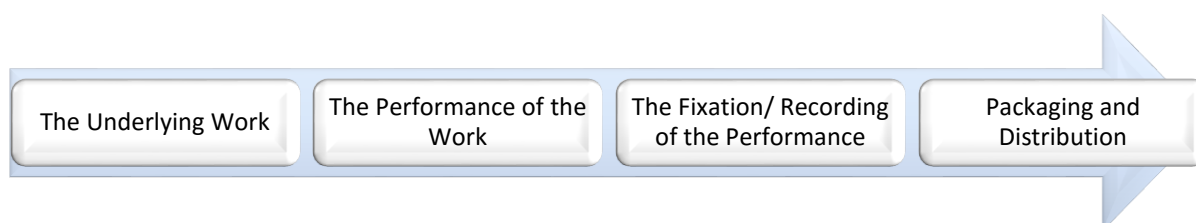
⁶⁴ A. Strowel, Towards a European Copyright Law: Four Issues to Consider in I. Stamatoudi and P. Torremans (eds.), *EU Copyright Law- A Commentary* (Cheltenham: Edward Elgar, 2014), para. 21.34.

⁶⁵ G. Hull, T. Hutchinson and R. Strasser, *The Music Business and Recording Industry- Delivering Music in the 21st Century* (New York: Routledge), p. 30.



Graphic 1: The phases of music business based on income streams.

These are also a reflection of how music is created and then used, each closely related to types of copyright works or neighbouring rights in practice. Going back to our example of ABBA’s Mamma Mia, the song in its written form is the underlying work. It would then be performed by the group ABBA as a whole, for example on stage. Finally, the LP containing the song performed by ABBA is made available to the public. However, records are not distributed in isolation. Instead, packaging the product includes a range of further works, especially creating cover art and the booklet which have become part of the consumer expectation of a product.⁶⁶ Although these works are not part of the song and its exploitation as such, they are relevant in terms of copyright and therefore licensing because they also constitute copyright works from a legal point of view. It is therefore prudent to extend the model to include this phase.



Graphic 2: The stages of Music Production.

Graphic 2 in essence represents a simplified version of the music business- the steps a song has to go through to reach the consumer on a large scale. However, artists often lack the financial ability to take their work through the different phases on their own on a sufficiently large scale to make a living. For example, someone has to pay for a song to be recorded in the studio; get CDs pressed in a sufficient quantity; distribute it to retailers all across the country; and advertise the product so that the consumer knows that the product exists. As a result, authors tend to assign their rights to intermediaries in return for a share of the revenue. These transfers occur on the market for creative goods.

The market for creative goods is characterised by high levels of uncertainty and high costs. It is impossible to know beforehand if a specific item will be successful or not. This makes the endeavour to invest in a creative product risky. An investor can never be sure that he will be able to recoup all of his investments. Marketing costs in particular will be high given that creative works are essentially experience goods whose value cannot be judged before purchase.⁶⁷ Given these high costs, authors cooperate with an intermediary who specialises in the production, packaging and

⁶⁶ Many special editions will be charged at higher prices because they are produced in lower numbers and include additional material in the form of booklets, posters, etc.

⁶⁷ J. Barnett, ‘Copyright without Creators’, *Review of Law & Economics*, 2014, Vol. 9, No. 3, p. 399.

delivery of goods to the consumer. Cooperation creates additional wealth which the parties share via a contract: authors focus on creating the work while the intermediary specialises in getting the work to the consumer.⁶⁸ In addition, the value of the rights themselves is affected by the cooperation as for example promotion raises its commercial potential.⁶⁹

There are a number of common features that describe the contractual relationship between authors and intermediaries. First, the contractual environment is shaped by copyright law. Copyright provides the exclusive property which gives the creator something to sell in return for a reward.⁷⁰ It also determines the exclusive rights available to the author, the exceptions that apply and sanctions for infringement among others.⁷¹ All of these influence the value of what the author has to sell. For example, more exclusive rights and stronger sanctions in combination with few exceptions enhance the control a right holder has over the work, making it more valuable to him in economic terms. Secondly, the contractual provisions in the first market are strongly influenced by the uncertainty of the market that they operate in. In particular, contractual terms vary according to the media in question as well as the track record of the author. In general, intermediaries demand at least a partial assignment of rights because they incur the costs. However, bestsellers get better terms than newcomers.⁷² Newcomers will often assign all of their rights to the intermediary.⁷³ Overall, the dynamics of the creative market mean that a transfer of rights from the author to the intermediary who can make the most profit from it should be expected when a work is commercially exploited.⁷⁴ In other words, it will not be the author but the intermediary who owns the rights in practice.

Due to high up-front costs and high levels of uncertainty in determining how successful a work will be on the consumer market (and therefore how valuable it will be), authors tend to assign their exclusive rights to intermediaries. These intermediaries have both the skills and financial resources to place the work on the consumer market in a way that an individual author cannot. This also means however that the ownership of rights as defined by copyright law will not be the same as ownership in practice. In other words, an author is not always able to grant a license to use the work because he does not own the rights anymore. Any discussion of copyright in the context of licensing therefore has to take into account the industry structure.

⁶⁸ R. Watt, 'Copyright Law and Royalty Contracts' in R. Towse and C. Handke (eds.), *Handbook on the Digital Creative Economy* (Cheltenham: Edward Elgar, 2013), p. 197.

⁶⁹ Watt, 'Copyright Law and Royalty Contracts', p. 200.

⁷⁰ M. Kretschmer, 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda', *Journal of Intellectual Property Law*, 2010, Vol. 18, p. 144.

⁷¹ Watt, 'Copyright Law and Royalty Contracts', p. 204.

⁷² M. Kretschmer, 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda', p. 164.

⁷³ M. Kretschmer, 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda', p. 164.

⁷⁴ J. Barnett, 'Copyright without Creators', p. 405.

2.3.3 Summary

In summary, the ownership of material subject to copyright-related protection depends on three factors. First, there is the classification of what type of subject matter it is: copyright or neighbouring rights. If the work is original enough to be considered the original expression of the author, then the work will be subject to the Creator Doctrine. As a result, the rights will by default be owned by the author- the work's creator. In the case of neighbouring rights, the law will explicitly define who it considers the maker (not author) and therefore the beneficiary of protection. Having said this, these general rules are subject to some transfer of ownership or licensing, if the object of protection was created in employment or commissioned. If the employer was a public authority, a separate set of rules applies. Thirdly, copyrights are commonly transferred between parties active in the creative market. These transfers differ in that they are shaped by contracts which function in a copyright environment but are not actually defined by it. These contracts are usually determined by common industry practice and play a major role in who holds which rights. Overall therefore, to identify the owner of rights which need to be licensed in the context of Europeana Sounds requires that all of the relevant subject matters are identified as well as their respective owners, taking into account not only legal provisions but also industry practice.

2.4 Conclusion

In summary, copyright-related protection covers a number of specific subject matters which fall into two distinct categories based on their rationale of protection. Copyright works, including for example literary works and musical compositions, are the original expression of authors. Neighbouring rights, on the other hand, are protected on the basis of the labour and investment their maker has invested into them. The legal provisions vary according to the subject matter in question and so a correct classification is essential.

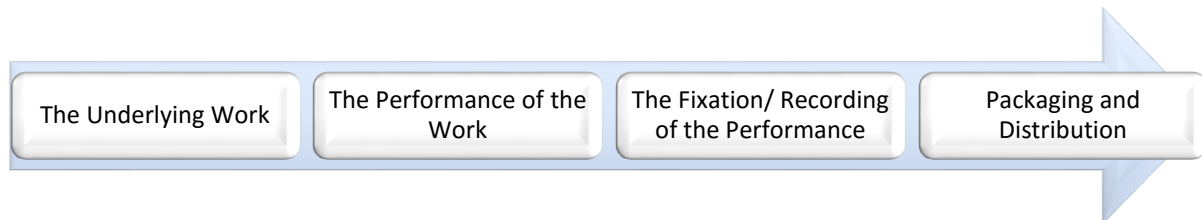
Each subject matter has its own set of exclusive economic rights. Their scope is limited to some extent, especially by the term of protection and permitted uses. The ownership of the rights crucially depends on the circumstances of creation/ production as well as the exploitation of the work. Copyright works are by default subject to the Creator Doctrine, meaning that the first owner of the rights is the work's creator. Neighbouring rights are granted to the maker, as defined by law. However, if the works were not independently created but at the behest of a third party, such as an employer or commissioner, ownership changes. Depending on the national provisions, the protection or at least some of the exclusive rights are then granted to the person on whose request the subject matter was made. Finally, if the objects of protection are exploited commercially, the rights are also commonly transferred to facilitate the process.

As the previous section has shown, it is not possible to generalise on copyright in practice. A number of key issues in particular have to be examined in more detail in the context of Europeana Sounds. Europeana Sounds focuses on music and related materials. As a result, the next section will now take a closer look at copyright provisions as they affect the material held by CHIs which contribute to the Europeana Sounds. It will discuss what the objects of protection in question are and how these are defined. In addition, the ownership of the exclusive rights in theory and in practice based on the music business will be outlined. In particular, the rules on first ownership only tell part of the copyright ownership story. Therefore, by discussing ownership from both the first ownership as well as the industry prospective, the reader will be able identify what is protected and who owns

the rights. The analysis combines EU law with the legal provisions of both Germany and the UK. This way, the range of likely provisions and approaches can be illustrated as it covers both common law and civil law countries.

3. The Music Industry and Copyright

The following sections will now discuss the production and packaging of music from a copyright point of view. The analysis follows the phases of production as outlined in Graphic 2.



Graphic 2: Stages of Music Production.

It will first discuss the underlying work; performances; recordings and distribution; and finally Packaging and Distribution. It will highlight the specific subject matter this will most likely entail and its ownership (both in theory and according to industry practice). At the end of this section, readers will be able to identify all of the relevant objects of protection incorporated in a physical medium and who owns it. The discussion will be illustrated using the previous example of Mamma Mia by Abba.

3.1 Phase 1: The Underlying Work

The entire music business is based on the creation of a song. Without it, there is nothing to perform, record and market. The first link in the value chain is therefore the writing of the song, meaning the melody and the lyrics. This process creates two distinct copyright works: a musical work (the melody) and a literary work (the lyrics).

3.1.1 Musical Works

The song Mamma Mia is most famous for its highly recognisable melody, the underlying musical work as it is called in copyright law. At EU level, musical works are not explicitly defined but article 2 of the Berne Convention refers to '*musical compositions with or without words*'.⁷⁵ On this basis, member states have more elaborated definitions both in their legislation as well as in their case laws to define the boundaries between musical and other categories of works as well as the public domain.

In the UK, a musical work means '*a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music*'.⁷⁶ It therefore covers any composition as long as it has originated from the composer. The German definition is more general, referring only to '*works of music*'.⁷⁷ This includes any kind of human-made sound, including voices or instruments⁷⁸, as long as a minimum level of originality is met.⁷⁹ In both countries, it is therefore only the musical

⁷⁵ Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), art. 2(1).

⁷⁶ s.3(1) 1988 CDPA.

⁷⁷ § 2(2) 1965 UrhG.

⁷⁸ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar* (München: C.H. Beck, 2012, 4th ed.), § 2, para. 134.

⁷⁹ BGH GRUR 1988, 812 – *Ein bißchen Frieden*, at p. 814.

composition that falls within this category, including the musical scores but not the lyrics. In terms of Europeana Sounds, all types of music would fall within this category, for example classical music, jazz but also techno as well as all kinds of traditional music irrespective of the instruments used.

Not protected are those sounds which cannot be considered the intellectual creation of the author. This has practical implications in that animal and natural sounds are not protected by copyright. They do not fall into a category of work and cannot be considered an original expression of the author. In respect of Europeana, this would in particular refer to natural sounds such as animal voices or other natural phenomena. There is no need to seek a license for these sounds because they are not in the remit of copyright protection. However, it should be noted here that the recording of sound as such can be protected as a phonogram (as discussed below).⁸⁰

A borderline case for protection is artificial sound because of the originality threshold. Using modern technology, it is possible to create sounds by using computers, for example the sound of a particular instrument. Sound effects as such are not necessarily protected under German law. Hoeren argues that sounds in a database of sounds, including a variety of instruments as well as background sounds such as animals, are not protected because they lack a minimum level of originality and expressiveness from the artist.⁸¹ In particular, the sound (*Klang*) of an instrument or similar device cannot gain protection. Instead, the requirement of protection is individual expression in the sequence of tones.⁸² In this vein, using complex modular sound parts stored in a synthesiser were also found to be not copyrightable.⁸³

In the UK, original has to be read primarily as ‘not copied’ and therefore only means that the work should originate from the author.⁸⁴ However, the focus of protection is clearly on music and this has to be distinguished from noise. It was held in the past that

‘...as indicated in the dictionaries, the essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener’s emotions and intellect.’⁸⁵

As a result, it is unlikely that computer-generated sounds as such would gain protection as musical works in the UK.

A more complicated issue are soundscapes. Soundscapes can take two distinct forms. First, they can be the combination of artificial sounds. In this case, there is a greater likelihood of being copyrightable in both countries compared to artificial sounds on their own. The originality requirement would most likely be met if the soundscape was consciously designed to elicit a certain response from the listener. For example, it was decided in Germany that the work of sound mixing

⁸⁰ See especially section 3.3.1 Phonogram.

⁸¹ T. Hoeren, ‘Sounds von der Datenbank - Zur urheber- und wettbewerbsrechtlichen Beurteilung des Samplings in der Popmusik’, *GRUR*, 1989, Vol. 1, p. 11.

⁸² T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 2, para. 136.

⁸³ OLG Hamburg ZUM 1991, 589, 592 – *Küss mich und lieb mich*.

⁸⁴ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch. 601, at pp. 608-609.

⁸⁵ *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281, 3294.

engineer can be original when the acoustic effects used in the film are very complex.⁸⁶ Similarly, the UK does not prescribe what kind of sounds have to be combined.⁸⁷ Given the lower originality threshold, soundscapes are in general more likely to be copyrightable in the UK than in Germany though.

Secondly, there are soundscapes which consist of a recording of background noises commonly heard in a specific environment, for example a market place or the jungle. In these cases, it is unlikely that the recorded sound would be protected in Germany. The sound is not created as such but only recorded. It is therefore not an expression of the author. It should be noted here that copyright works played in the background, for example music, may require a license in their own right. If copyright works are incidentally included in the recording, these are not relevant for the licensing as long as they do not form an integral component.⁸⁸ However, this has to be interpreted narrowly. If something is 'immaterial' in the sense of the law depends on the listener and not the intent of the creator.⁸⁹ The music played at a location and recorded in a documentary is, for example, not covered by this exception.⁹⁰ Overall, it seems likely that a work played in the background has to be considered for licensing- although the decision should be made on a case by case basis.

In the UK, the soundscape itself is also unlikely to be considered a musical work in its own right, given the definition of music. As far as works played in the background are concerned, musical works are explicitly excluded from incidental inclusion unless it was done deliberately.⁹¹ Deliberate is context- dependent, referring especially to the situation of creation and the reason for the inclusion. Key is that the inclusion is incidental to *another* purpose.⁹² It therefore has to be assessed if the inclusion was subordinate or casual, meaning inessential. If a work is used for example to illustrate a theme, then the inclusion is not incidental.⁹³ As a result, a work played in the background of a soundscape which has no relevance to the intent of the recording may not have to be considered separately in the UK. However, the judgement has to be made on a case by case basis. For example, if the soundscape was designed to record amusement park music, then the included work would have to be treated in its own right.

⁸⁶ In the case, the debate was about the management of copyright. The CMO in question had to include the sound mixing engineer in its management due to the high level of originality of his work, making him a co-author of the film and therefore deserving of membership. BGH IIC 2003, 839- *Sound Mixing Engineer*.

⁸⁷ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 3-48.

⁸⁸ § 57 1965 Urhg; OLG München ZUM-RD 2008, 554, at 555.

⁸⁹ OLG München NJW 1989, 404- *Abdruck von Kunstwerken in Werbeprospekten*.

⁹⁰ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 57 para. 2.

⁹¹ s. 31(3) 1988 CDPA.

⁹² *The Football Association Premier League Ltd v Panini UK Ltd* [2004] 1 W.L.R. 1147, at 1156.

⁹³ *Fraser-Woodward Ltd v BBC* [2005] EWHC 472, 491-492.

3.1.2 Literary and Oral Works

In addition to the musical work, the song *Mamma Mia* also includes lyrics. In copyright, these are considered literary works. Under the Berne Convention, a literary work ‘...is every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings...’.⁹⁴ As this definition shows, a literary work includes written works of any kind. This is directly followed in the article by works based on the spoken word: ‘...lectures, addresses, sermons and other works of the same nature...’.⁹⁵ However, although these two are distinct in the Berne Convention, many countries have chosen to implement them as one category. In the UK, literary work refers to ‘any original work, other than a dramatic or musical work, which is written, spoken or sung’.⁹⁶ Under German law, a literary work (*Sprachwerk*) is any work that conveys information⁹⁷ in a visual or audible manner or by touch (for example Braille). This explicitly includes written works and speeches.⁹⁸ As a result, in both countries, the definitions cover any manner of spoken or written words as long as they are original.

With reference to *Europeana Sounds*, this type of work would cover any kind of speeches; poetry; debates and talks; interviews (both with lay people and professionals); ethnographic studies; conferences; audio versions of books and opinion pieces of any kind. It would also cover accompanying materials such as booklets or manuscripts. It needs to be emphasised here that this category also includes song lyrics. However, musical scores, despite being written down, are not protected as literary works but as musical works.⁹⁹

Nonetheless, not all types of spoken words are necessarily protected. Copyright does not protect ideas but their expression. As a general rule, the more freely the person expressed himself, the more likely it is that the result qualifies as a literary work because the author will be more likely to have carried out the creative choice that an ‘intellectual creation’ requires. This is for example relevant to recordings of traditional stories or foreign languages and accents. If recordings of accents, dialects or languages are of people telling a story, it is likely that the story would be considered a literary work. This is also the case if the story in question is very old, for example a fairy tale, folklore or an ancient myth. The specific expression contained in a recording can be copyright protected while the underlying story (the idea) is in the public domain.¹⁰⁰ On the other hand, if the recording contains people repeating specific sounds or words in different languages or accents but these spoken words do not carry any coherent meaning, it is less likely that this would meet the originality threshold required for protection as a literary work. In summary, if something qualifies as a literary work depends on the originality threshold as it relates to the specific expression of the author rather than the age of the idea.

⁹⁴ Berne Convention, art. 2(1).

⁹⁵ Berne Convention, art. 2(1).

⁹⁶ s.3(1) 1988 CDPA.

⁹⁷ BGH GRUR 1959, 251– *Einheitsfahrchein*; H. Ahlberg and H.-P. Götting, *Urheberrecht*, §2 para. 4.

⁹⁸ § 2(1)(1) 1965 UrhG.

⁹⁹ H. Ahlberg and H.-P. Götting, *Urheberrecht*, § 2 para. 14; T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht- Kommentar*, § 2 para. 135; N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 3-48.

¹⁰⁰ This is for example the reason why there a large number of fairy tale collections, each with its own copyright.

3.1.3 Summary

In summary, a song is made up of two distinct copyright works. The melody is protected as a musical work which covers both its written and audible form. The lyrics are protected as a literary work. This category of work includes any kind of written or spoken word, whatever shape it takes. However, all of these categories are subject to the originality threshold. While the threshold is not likely to impact significantly on established works such as a novel or a piece of jazz music, it can exert an influence on less common pieces of work. In particular, in these cases the remaining variation in the harmonization at EU level may exert an influence, for example on the protection of dialects, etc. In these cases, one should always refer back to national legislation and especially case law to establish if a particular work meets the standard of originality.

3.1.4 Ownership

As mentioned before, copyright works at EU level are subject to the Creator Doctrine. First ownership is therefore by default granted to the author, understood as the person who created the work. If the work has not been commercially exploited or even remains unpublished during the lifetime of the author, the copyright ownership will most likely belong to the author's heirs.

There are two major exceptions to this, both of which are the result of transitional provisions. First, Germany provided for a transfer of copyright under the 1901 LUG (*Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst*). In particular, if a work had not been published within 30 years after the death of the author, the copyright was assumed to be transferred to owner of the manuscript.¹⁰¹ It is therefore possible that not the author's heirs but the owner of the physical copy is the owner of the copyright in these manuscripts. Secondly, the UK had to extend the term of protection for copyright works as a result of the Term Directive from 50 years after the death of the author to 70 years. The extended copyright term is given to the last copyright holder and only in the case of his death (or ceased to exist in case of a legal person) does the revived term benefit the original author or his representatives.¹⁰² However, if the assignment was only for a limited time, the extension is owned by the person to whom the copyright was due to return.¹⁰³

It is possible that either the melody or the lyrics or both were created by more one than one person. For example, the song Mamma Mia has three authors: Benny Andersson, Björn Ulvaeus and Stig Andersson. If there is more than one author, the ownership of the work crucially depends on the characteristics of the work. There are two situations which need to be distinguished here: when the contributions of the work are so connected that they are indistinguishable from each other and when they are not.¹⁰⁴

In the first groups falls co-authorships where more than one author have collaborated to create a work. In the case of music, this would for example two or more individuals creating the lyrics

¹⁰¹ § 29 1901 LUG. The 30 year term overlapped directly with the expiration of the copyright term. The Act remained in force until 1/1/1966.

¹⁰² N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-139.

¹⁰³ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-138.

¹⁰⁴ For a more detailed discussion in cross-national variation of defining joint works, including more national examples, can be found in: C. Angelopoulos, 'The Myth of European Term Harmonisation: 27 Public Domains for 27 Member States', *International Review of Intellectual Property and Competition Law*, 2012, Vol. 43, No.5, p. 567-594.

or melody together. Under German law, if a work has been created by more than one creator and their individual contributions cannot be exploited separately, all creators are considered authors.¹⁰⁵ The key feature of this type of work is a shared intent in creating the work and mutual leadership.¹⁰⁶ In the UK, the term joint work is introduced if the contributions are indistinguishable. The definition only partially overlaps with the German one, emphasising the involvement of more than one author and the inseparability of their individual contributions.¹⁰⁷ The difference here is that the contributions themselves cannot be distinguished rather than cannot be exploited individually. This means that while the UK presupposes one coherent work, the German law does give some leeway for distinction between the contributions of authors. The UK law also treats joint authorship as a question of fact, rather than presupposing a will to create a joint work or be joint authors.¹⁰⁸ Collaboration is essential though.¹⁰⁹

The second situation is where one work is made up of individual and distinguishable contributions of two or more authors. It should be noted that the connected works are not necessarily of the same type. As described in the previous section, a song is made up of the literary work in the form of the lyrics and the musical work which includes the melody. As a result, there are two copyright owners- two distinct authors. This is especially important because EU law contains special provisions for musical works for which the lyrics were specifically written: they are to be considered as a work of joint ownership.¹¹⁰

If the contributions can be distinguished, the UK does not have a category for this type of work as such. However, when literary and artistic works are combined, the overall work is protected as a compilation and therefore a literary work.¹¹¹ Furthermore and more importantly for European Sounds, musical works are explicitly defined as joint works even though the contributions are distinguishable.¹¹² This however only applies if the lyrics were written specifically for the musical composition.

German law knows two separate categories of works which have individually exploitable contributions by two or more authors. If existing works are connected into a single work, the work can be considered a separate work if the selection and arrangement of the materials meet the minimum originality requirement (*Sammelwerk*).¹¹³ The person who has done the selection and arrangement is considered the work's creator and therefore author. It should be noted here that the contributions do not necessarily have to be copyright protected, neither do the authors need to have had an express will to create this shared work.¹¹⁴ If the work gains its own copyright or a

¹⁰⁵ § 8(1) 1965 UrhG.

¹⁰⁶ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 8 para. 2.

¹⁰⁷ s.10 1988 CDPA.

¹⁰⁸ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 4-34.

¹⁰⁹ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 4-36.

¹¹⁰ Directive amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (2011/77/EU Directive) (Term Directive), art. 1(7). This provision is limited to the calculating the term of protection and prevents that either the musical or the literary work expire before the other in the context of music.

¹¹¹ s.3(1)(a) 1988 CDPA.

¹¹² s.10A 1988 CDPA.

¹¹³ § 4 1965 UrhG.

¹¹⁴ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 4 para. 5.

Sammelwerk in Germany, then the copyright in the overall work is owned by the creator of it. This overall copyright does not affect the copyright in the individual contributions.

Distinct from this, several authors can consciously decide to connect their works to create a joint work (*verbundenes Werk*).¹¹⁵ The difference between the two is that the authors of a *Verbundwerk* connect their contributions while the author of a *Sammelwerk* uses the contributions of third parties.¹¹⁶ An author that has contributed to a *Verbundwerk* can request the other authors to agree to the exploitation within the limits of what can be reasonably expected though.¹¹⁷ This essentially means that if authors have agreed to connect their (previously separate) works, they have to cooperate in its exploitation.¹¹⁸ They therefore hold individual copyrights and exercise these together- but they have not created an independent work.¹¹⁹ In Germany, this is how a song would be treated which has different authors for the musical and the literary work.¹²⁰

3.1.4.1 Summary

In summary, the copyright in the musical composition and the lyrics are subject to the Creator Doctrine. As a result, their authors and therefore creators are considered the first copyright owners. It should be noted though that if more than one natural person have collaborated in the creation process, they are considered co-authors and required to cooperate in the exploitation of the work. In addition, a song is under EU law recognised as a unit, at least when the lyrics were specifically written for a song or vice versa. While the UK has implemented it, the classification in Germany is more reliant on the traditional definitions of connected works. It is the relationship between the contributions which determines the status of the authors and the extent to which they can independently exercise their rights. In particular, a song could qualify as a *Verbundwerk* which is not a separate copyright as much but nonetheless requires all of the authors involved to cooperate in its exploitation.

¹¹⁵ § 9 1965 UrhG; Please note that this term is used in the official German translation. However, in the UK and EU, it refers to a different kind of work, namely a work where contributions cannot be separated. The exception are songs which are explicitly defined as joint works under EU law, making the composer and lyricist co-authors, although the contributions can be distinguished.

¹¹⁶ H. Ahlberg and H.-P. Götting, *Urheberrecht*, §4 para. 7.

¹¹⁷ § 9 1965 UrhG.

¹¹⁸ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 9 para. 1-2.

¹¹⁹ The authors instead form a *Gesellschaft bürgerlichen Rechts* as a result of § 9 1965 UrhG. BGH GRUR 1982, 743- *Verbundene Werke*, at 744.

¹²⁰ §65(3) 1965 UrhG. That is except for calculating the term of protection for which the authors are considered co-authors.

3.1.5 Industry Practice

The previous section has outlined how literary and musical works are first owned by their author and therefore creator. However, to reach the end consumer on a commercial scale, a literary work has to be published- most commonly as a book. At this point now, copyright ownership is strongly shaped by industry practices. To get a literary work published, the author usually assigns all rights, for all languages and all media to a publisher.¹²¹ Given the generally stronger bargaining power of bestsellers, it is more likely that successful authors are able to negotiate retaining at least some rights.¹²² The assignment is done in most cases using a standard royalty contract.¹²³ Overall, the publisher most likely owns the rights and has a direct relationship with the author. It can therefore identify the author, other right holders and most likely also provide licenses.

Just as with literary works, commercial exploitation of songs also requires the support of an intermediary. In the context of songs, the first transfer of copyrights usually occurs shortly after its creation in practice. A song in general only generates income if it is performed in public or distributed in another way, for example as a record. The publisher's main function in the music business is to promote the song, administer the rights and collect royalties.¹²⁴ In exchange for these services, the song writer will assign his copyright to the publisher in return for a share of the royalties and possibly an advance.¹²⁵ The author may retain certain rights though,¹²⁶ especially in relation to international rights if the publisher is too small to ensure efficient world-wide exploitation.¹²⁷ As a result, at this stage, the copyright in the song has changed ownership. In particular, it will be the publisher who administers the rights from all the relevant income streams. Nonetheless, the composer, lyricist and the publisher all share the claim to the royalties.

In conclusion, for commercially exploited literary and musical works, it will be the publisher who owns the rights. The authors will assign the rights to him in return for a royalty.

3.1.6 Conclusion

In summary, the music business is based on the exploitation of songs. In terms of copyright, a song has to be divided into a musical work and a literary work. Both of these are subject to the Creator Doctrine. This means that they have to meet a minimum originality, defined at EU level as the author's own intellectual creation. They can therefore not be copied and have to show some creative choices that the author has made in the process of making the work. However, how this definition applies in practice continues to show cross-national variation. This is especially the case in

¹²¹ G. Davies and R. Balkwill, *The Professionals' Guide to Publishing- A Practical Introduction to Working in the Publishing Industry* (Unknown: Kogan Page, 2011), p. 235.

¹²² G. Davies and R. Balkwill, *The Professionals' Guide to Publishing- A Practical Introduction to Working in the Publishing Industry*, p. 235.

¹²³ R. Caves, *Creative Industries- Contracts between Art and Commerce* (Cambridge, MA: Harvard University Press, 2000), p. 57.

¹²⁴ P. Rutter, *The Music Industry Handbook* (New York: Routledge, 2011), p. 89.

¹²⁵ P. Rutter, *The Music Industry Handbook*, p. 94.

¹²⁶ P. Isherwood, *Legal & Business Issues in the Music Industry -1998 Review & Analysis* (London: Thorogood Publishing, 1998), p.36.

¹²⁷ G. Hull, T. Hutchinson and R. Strasser, *The Music Business and Recording Industry- Delivering Music in the 21st Century*, p. 122.

less common content such as soundscapes. Furthermore, the originality threshold also means that non- human sounds such as birds singing are not considered a musical work under copyright law.

The ownership of copyright is, under the Creator Doctrine, first granted to the author and therefore the creator of the work. While this rule is well established today, there have been instances in the past when it was deviated from, for example in the context of unpublished manuscripts. Given the age of the archival material, these transitional rules have to be kept in mind. If works were created by more than one author, they are considered co- authors with each holding a share in the rights. How these joint works are defined varies between countries. Nonetheless, musical works in the UK are always considered joint works while Germany and the EU only consider them as such for the purpose of calculating the term of protection. It should also be noted at this stage that the Creator Doctrine is not absolute. Most notably, the author of works created in employment can be the employer in the UK while in Germany he has at least a claim to some to some exclusive rights (although not the copyright as such). The extent of the employer’s control depends however on the contract as well as the law at the time.

Phase 1		
Subject Matter of Protection	Musical Work	Literary Work
Default Ownership	Author	Author
Practical Ownership	Publisher	

Graphic 3: Summary of copyright provisions and industry practice for musical and literary works.

3.2 Phase 2: The Performance of the Work

In the first phase, the song was created. However, according to its purpose and accessing its commercial potential, the song has to be made audible for the audience. To this end, it has be performed: played or sung.

The protection for performances differ from copyright in their focus of protection. Performances are a reflection of a copyright work: a performance makes another copyright subject matter perceptible to the human senses. This also means that it does not actually create a new work within the understanding of copyright. Performances are therefore not considered copyright works and so the Creator Doctrine does not apply. Instead, performances are considered a neighbouring right. They are protected for their economic importance rather than creativity. Having said this, performances in particular are something of a hybrid. They are not technical in the same way that the other neighbouring rights, especially phonograms and broadcasts, are. They do contain a clear a human component and this is explicitly recognised by national laws as the following discussion will show.

EU legislation defines the rights which apply to performances but do not explicitly what they mean with the terms ‘performance’ and ‘performer’. However, the Rental Rights Directive in particular continuously refers back to the Rome Convention. Furthermore, all EU member states are signatories to it. It is therefore valid to use the definition provided there as a starting point. It defines performers as ‘actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim,

*play in, or otherwise perform literary or artistic works.*¹²⁸ An extended version of this definition was used in 1996 in the WPPT to which all member states are signatories. Here “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.¹²⁹ As these definitions make clear, a performer is the person who acts out or interprets a work. The term covers anyone who interprets the work himself, either individually or collectively, as well as those individuals which have a direct influence on the concrete performance, for example conductors of orchestras.¹³⁰ However, it only applies to works considered artistic, literary or expression of folklore. The terms literary and artistic work have to be interpreted in the context of the EU as referring back to the Berne Convention.¹³¹ It therefore definitely covers the interpretation of both the musical work and the literary work discussed here. As a result, performances which are not the performance of a work, for example in the circus, can be protected but do not have to be. There is no requirement to protect these under the Rome Convention.¹³² However, performers of folklore are protected under the WPPT.

As the discussion of international provisions has shown, the definition of what performer is gives some leeway to member states. It is therefore national provisions which have to be consulted. German copyright law follows the international approach and protects performances via the term performer: ‘a person who recites or performs a work or participates artistically in the recitation or performance of a work.’¹³³ It explicitly introduces an artistic requirement which functions as a threshold. For example, only reading a work out loud, like a news reader does, is not sufficient.¹³⁴ This threshold is an indicator of the hybrid nature of performances as mentioned before. It should also be noted that only performances of works are covered.

The UK, on the other hand, has adopted a different approach. It does not define the term performer to give substance to the meaning performance but instead defines the term performance itself. The UK defines a performance as:

*(a) a dramatic performance (which includes dance and mime),
(b) a musical performance,
(c) a reading or recitation of a literary work, or
(d) a performance of a variety act or any similar presentation,
which is, or so far as it is, a live performance given by one or more individuals*¹³⁵

This definition differs from the German one. First, it does not include any explicit reference to originality. It is therefore the traditional standard based on labour and effort which needs to be applied. However, there is no artistic component as such. In addition, it also includes variety acts or similar presentations and therefore a performance is not limited to a work as such. This means that

¹²⁸ 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), art. 3.

¹²⁹ 1996 WIPO Performances and Phonograms Treaty (WPPT), art 2(a).

¹³⁰ S. von Lewinski, *International Copyright Law and Practice*, para. 6-16.

¹³¹ S. von Lewinski, *International Copyright Law and Practice*, para. 6-15.

¹³² S. von Lewinski, *International Copyright Law and Practice*, para. 6-15.

¹³³ *German Copyright Act (Official Translation)* (http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0053, last accessed 11/9/15).

¹³⁴ BGH GRUR 1981, 419 – *Quizmaster*, at 420; LG Hamburg GRUR 1976, 151 – *Rundfunksprecher*.

¹³⁵ s.180(2) 1988 CDPA.

the definition is wider than the one used in the Rome Convention and WPPT. Nonetheless, both countries only grant protection to natural persons.¹³⁶ In the context of Europeana Sounds, this category is likely to include any kind of recorded performance, such as recitations, acting in audio-visual works or musical performances as well performances of folklore.

A practical issue arises from the protection of foreigners, in particular non- EU states. The general rules on protection of performances are defined in the Rome Convention, referenced later by both TRIPs and the WPPT. The Convention includes three distinct hooks for protection in addition to performances which take place in its territory:

- (a) the performance takes place in another Contracting State;*
- (b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;*
- (c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.*¹³⁷

In other words, a performance is protected if it took place, is recorded in a phonogram or broadcast in a member states of the Rome Convention.¹³⁸ As both TRIPs and WPPT as well as EU legislation refer back to the Rome Convention, these rules therefore apply to member states of any of these agreements. In practice, the scope of protection covers all eligible performances which were first published in Germany¹³⁹ and the UK¹⁴⁰. In addition, as both a member states to the agreements named above, the protection in practice extends to citizens or residents of all EEA¹⁴¹, Rome Convention, WIPO Performances and Phonograms Treaty (WPPT) and The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) member states.¹⁴² Finally any country covered by another treaty or Order is also included.

Based on the definitions in both countries, it can therefore be safely assumed that any performer whose performance was published within the EEA or when the performer has EEA citizenship/ residency and meets the minimum requirements of originality, as defined by the national law, is entitled to protection. Given Europeana's cultural heritage mission and the nature of its archival materials, a large number of performances will be covered. More detailed checks will be necessary for recordings made outside of the EEA, especially if the state in question is not party to an international agreement. A performance will not have to be licensed as part of Europeana if the performance is carried out by a non- EEA foreigner, the fixation was made or published in a non- EEA state and no specific treaty with the country of origin and citizenship guaranteeing protection exists.

¹³⁶ The definition of a qualifying performer refers to an 'individual' which excludes legal persons. N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 12-24. A person who recites or performs a work or participates artistically in the recitation or performance of a work.

¹³⁷ Rome Convention, art. 4.

¹³⁸ For a detailed description of the requirements on phonograms and broadcasts, please see the relevant sections below. It should also be noted that the USA is not a member of the Rome Convention, however it has joined other relevant treaties, in particular the TRIPs Agreement.

¹³⁹ § 79(1) 1965 UrhG.

¹⁴⁰ It should be noted that this applies retrospectively also to performances carried out before 1988. N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 12-24.

¹⁴¹ The rules on copyright have been extended to the European Economic Area.

¹⁴² The list of applicable countries and definitions can be found in Copyright and Performances (Application to Other Countries) Order 2013/536 art. 6 and Schedule 1 Application of Parts I and II; T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht- Kommentar*, §125 para. 15 et seq.

Although the scope of this will be very narrow in practice, it can be relevant in relation to developing countries which have not joined international conventions or bilateral agreements.

EU law only provides rights for the performer. However, both the UK and Germany have supplemented these with a neighbouring right for the organiser of a performance. This protection is relevant if the performance is a live performance. The clear aim here is to protect the value of the live performance for those investing and exploiting it. This kind of protection has to be taken into account if archival material is that of a live performance. In these cases, it is possible that both the performer and the organiser hold rights in the live performance. A license from both would therefore be required.

3.2.1 Ownership

The rights in a performance are generally granted to the performer.¹⁴³ This refers to the person who has carried out the actual performance, for example sung the song or stood on stage. However, it can also include background singers and other individuals that have contributed. The rights of organisers are not determined at EU level. In the UK, the performer's exclusive right is supported by the rights of the 'person having recording rights'.¹⁴⁴ In essence, these rights protect the person who has a contract with the performer to record his performance for commercial exploitation. Depending on the contract, this can even overrule the performer's ability to give consent to the fixation of a performance.¹⁴⁵ The exclusive rights of the performer are supplemented in Germany by the rights for the company which organised the performance.¹⁴⁶ The organiser is the person in charge of the event, especially but not limited to making contracts.¹⁴⁷

Performances in the music business are in most cases subject to a recording contract between the performer (artist) and the record label. The artist is required to provide his exclusive recording service in return for the record label funding the making of the record as well as pay royalties to the artist.¹⁴⁸ This exclusivity is recognised in copyright law. In the case of live performances in front of an audience, the recording rights become relevant. In practice, the 'person having recording rights'¹⁴⁹ and in Germany, the organiser of the performance¹⁵⁰ are protected. This mainly refers to the person in charge of the event, in particular the company which organised the individual components such as making contracts with participators.¹⁵¹ Given the role of record labels

¹⁴³ See also EU Law, for example InfoSoc Directive, art. 2(b).

¹⁴⁴ s.185 et seq. 1988 CDPA.

¹⁴⁵ s.185(1) 1988 CDPA. In the section it says: 'an "*exclusive recording contract*" means a contract between a performer and another person under which that person is entitled to the exclusion of all other persons **(including the performer)** to make recordings of one or more of his performances with a view to their commercial exploitation.' [bold added]

¹⁴⁶ § 81 1965 UrhG.

¹⁴⁷ OLG München GRUR 1979, 152 – *Transvestiten-Show*. This case was originally on infringement by not getting a license for copyrighted works. The focus of the reasoning is on the characteristics of an event organiser and his relevance to copyright, providing an operational definition of this.

¹⁴⁸ P. Isherwood, *Legal & Business Issues in the Music Industry -1998 Review & Analysis*, pp. 29 and 31.

¹⁴⁹ s.185 et seq. 1988 CDPA.

¹⁵⁰ § 81 1965 UrhG.

¹⁵¹ OLG München GRUR 1979, 152 – *Transvestiten-Show*. This case was originally on infringement by not getting a license for copyrighted works. The focus of the reasoning is on the characteristics of an event organiser and his relevance to copyright, providing an operational definition of this.

in organising performances, it is likely that the right is owned by the record label, at least in the UK.¹⁵²

3.2.2 Conclusion

In summary, the performance of a work is protected in its own right as a neighbouring rights. The protection at EU level is drawn from the Rome Convention and WPPT, granting the performers of literary and artistic works protection. This is essentially the approach implemented by Germany. However, other types of performances, especially those which do not include an underlying work as defined by the Berne Convention can also be protected and the UK does so.

Performances are neighbouring rights and therefore as such not subject to the Creator Doctrine. However, their artistic nature makes them a hybrid- a fact strongly reflected in Germany’s artistic requirement as a threshold for protection. In the UK, the threshold is bound to be lower in the absence of the Creator Doctrine. It applies the same level as for the neighbouring rights: labour and investment. Being a neighbouring right also has the effect that particular care has to be taken if a performance has not originated within an EEA, Rome Convention, WPPT or TRIPs member state as these may not benefit from protection at all.

Although the performance right is an exclusive right granted to the performer, it will most likely be held in practice by the record label in the case of musical performances. The performer assigns the rights in return for an advance and royalties. In the case of live performances, the recording rights are also likely organiser or the record label.

Phase 2		
Subject Matter of Protection	Performance	Recording Rights
Default Ownership	Performer	Organiser
Practical Ownership	Record Label	Record Label/ Organiser

Graphic 4: Summary of neighbouring rights provisions and industry practice in relation to performances.

¹⁵² N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 26- 187.

3.3 Phase 3: The Fixation of the Performance

There are two ways a performance can be recorded: in a phonogram (sound recording) or as an audio-visual work. In the context of music, the most common way is to record it as a phonogram.

3.3.1 Phonogram

In the music business, the most common form of fixation of the song and the performance is as a sound recording. It is the third step of the exploitation and lays the foundation for the revenue stream based on selling records. As with performances, phonograms are not considered a copyright work but a neighbouring right. The Creator Doctrine therefore does not apply. The phonogram is the result of recording the sound in a way that it can be replayed and therefore a technical process rather than an intellectual creation as copyright works are. This protection is independent of the form the recording takes and therefore includes mp3s, CDs, cassettes but also older technologies such as LPs or gramophone cylinders. In essence, it is the effort of making the first recording that is protected here rather than the physical copy as such. As a result, every single physical medium that contains the recording also contains the effort that has gone into making its first fixation and therefore benefits from protection.

As with performances, EU law itself does not define what a phonogram is. It only states that the rights related to it are to be granted to the record producer.¹⁵³ At this stage, it is necessary to clarify two terms: phonogram and phonogram producer. The term phonogram is defined in the WPPT as '*the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work*'.¹⁵⁴ However, the required standard of labour that has to go into making the phonogram as such still varies between member states. The different standards are directly linked to the different conceptualisations of what copyright actually is. This can be illustrated using the national provisions in Germany and the UK.

In the UK, any recording of sounds is likely to qualify for protection as long as the recording is not a copy of a previous recording.¹⁵⁵ This means that the required level of effort is low. On the other hand, German law refers to what it calls entrepreneurial effort (*unternehmerische Leistung*).¹⁵⁶ While this may sound the same as in the UK, it is not in practice. The minimum threshold, expressed in either organisational, technical or economic effort or investment, is higher in practice. For example, a private recording of a broadcast or performance via speakers are not sufficient for protection of the recording.¹⁵⁷ This is not meant to exclude non-commercial recordings¹⁵⁸ or those not intended for distribution per se.¹⁵⁹ Instead, it aims to ensure that only those phonograms gain protection where

¹⁵³ InfoSoc art 2(d) and art 3(b).

¹⁵⁴ 1996 WIPO Performances and Phonograms Treaty (WPPT), art 2(b).

¹⁵⁵ s.5A 1988 CDPA.

¹⁵⁶ BGH GRUR 2009, 403 – *Metall auf Metall*.

¹⁵⁷ H. Ahlberg and H.-P. Götting, *Urheberrecht*, §85 para. 14.

¹⁵⁸ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 85 para. 24.

¹⁵⁹ BGH GRUR 1999, 577– *Sendeunternehmen als Tonträgerhersteller*, at 578; BGH GRUR 1982, 102– *Masterbänder*, at 103.

sufficient effort has gone into its creation.¹⁶⁰ The actual minimum requirement remains open though.¹⁶¹ However, in both Germany and the UK, the type of sound recorded is irrelevant for this type of protection.¹⁶² For example, sounds can include both natural and/or artificial sounds.¹⁶³

In relation to Europeana, it can be assumed that all consciously made sound recordings in the collections are subject to protection as long as they are not copies from previous recordings. In Germany, the effort should also include some targeted action to ensure that the recorded sounds can be replayed. In practice, this would definitely include all commercial recordings and most non-commercial ones unless the recording was more or less incidental.

The rights related to the phonogram are granted to the phonogram producer. The role of the producer is to combine the artistic talent with the physical and monetary resources to create the finished and marketable master recording.¹⁶⁴ The term is not defined in either the Rome Convention or EU law. It is therefore national provisions one has to rely on. Under German law, the protection is granted to whoever was in charge of the first fixation of the subject matter and carried out the organisational preparation required.¹⁶⁵ This can be both natural and legal persons which is emphasised by the legislation: it explicitly grants the right to the company.¹⁶⁶ In the UK, the right is explicitly granted to the producer.¹⁶⁷ It should be noted that this provision is very similar to the current German understanding, referring to the 'the person by whom the arrangements necessary for the making of the recording.'¹⁶⁸ Or as Isherwood phrased it, today the producer is the creative controller of the recording project, especially its supervision and re-mixing.¹⁶⁹ However, if a sound recording was made before 1988 CDPA took effect, the ownership can differ in the UK. First, in the case of a commissioned subject matter, it will be owned by the commissioner.¹⁷⁰ If the record was made under the 1911 Copyright Act (in effect until 1/6/1957), the first owner of the plate and therefore most likely the employer of the actual producer will own the rights.¹⁷¹ In summary, the right in phonograms is granted to the person who plays the active role in the supervision and production of the phonogram, considered the first fixation of sound.

However, as with all neighbouring rights, protection is dependent on meeting minimum formalities. The hooks are not originally defined not in the WPPT but by reference in the Rome Convention. Under the Rome Convention states: '*producers of phonograms who are its nationals, as*

¹⁶⁰ The aim of the recording is not a determining factor under German law but the investment of skill and effort can be best understood in this context in practice.. T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht- Kommentar*, § 85 para. 24.

¹⁶¹ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 85 para. 24.

¹⁶² N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 7-78.

¹⁶³ H. Ahlberg and H.-P. Götting, *Urheberrecht*, §85 para. 10-11; N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 7-78.

¹⁶⁴ G. Hull, T. Hutchinson and R. Strasser, *The Music Business and Recording Industry- Delivering Music in the 21st Century*, p. 214.

¹⁶⁵ BGH GRUR 2004, 421– *Tonträgerpiraterie durch CD-Export*, at 423.

¹⁶⁶ § 85(1) 1965 UrhG.

¹⁶⁷ s.9(2)(aa) 1988 CDPA.

¹⁶⁸ s.9(2)(a) 1988 CDPA, repealed in 1996.

¹⁶⁹ P. Isherwood, *Legal & Business Issues in the Music Industry -1998 Review & Analysis*, p. 40.

¹⁷⁰ S.12(4) 1956 Copyright Act, N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-43.

¹⁷¹ S.19(1) 1911 Copyright Act, N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-44.

*regards phonograms first fixed or first published on its territory.*¹⁷² Phonograms are protected if the producer is a national of a contracting state. This is an obligatory requirement. In addition, member states are free to protect those phonograms which have been either first fixation or publication has been carried out in a member state. It should be noted that the conditions are cumulative to some extent: it is always nationality and first fixation or nationality and first publication. This way, both published and unpublished phonograms from signatory states are covered.¹⁷³ As a result, phonograms from any member state of the EEA, Rome Convention, TRIPs and WPPT will be protected as long as these accumulative criteria are met.

In practice, the producer of a record hardly ever holds the rights in the final product. Rather, they are commonly transferred to a record label. Producers can either work directly for a record label or be independent. If the producer works for the record label in return for a salary, it is likely that this would fall within the employment ownership rules. In practice though, most record producers are independent.¹⁷⁴ In this case, the record label gains control over the rights on the basis of a contract. The rights in the recording are transferred from the independent record producer to the record label in return for an advance and a royalty fee.¹⁷⁵ In our example of Mamma Mia, Benny Andersson and Björn Ulvaeus are considered the producers but the rights in return for royalties are held by Polar Music International- a record label which now belongs to Universal Music.¹⁷⁶

It should be noted here that the costs for the producer are essentially paid for by the artist. First, the production costs of a recording are part of the recoupable investment of the record label.¹⁷⁷ When an artist signs a recording contract, he assigns his own rights in return for a royalty fee as well as an advance. However, some of the expenses incurred by the record label in the getting the performance to the consumer market are considered recoupable investment. This commonly includes the advance but also the recording costs as well as in some cases parts of the advertisement costs. Only once these investments have been recouped by the record label will it start paying royalties to the artist. Secondly, the producer's royalty fee is paid out of the performing artist's share of the royalty income and not the record label's.¹⁷⁸ In other words, the cost of acquiring the rights in the recording are paid for by the artist as part of the recording contract between the artist and the record label as well as the producer and the record label. The rights in the recording are usually owned by the record label, either via employment copyright rules or as a result of the contractual arrangements with the producer.

¹⁷² Rome Convention, art 2(b).

¹⁷³ S. von Lewinski, *International Copyright Law and Practice* (Oxford: Oxford University Press, 2008), para. 6.10.

¹⁷⁴ P. Isherwood, *Legal & Business Issues in the Music Industry -1998 Review & Analysis*, p. 40.

¹⁷⁵ G. Hull, T. Hutchinson and R. Strasser, *The Music Business and Recording Industry- Delivering Music in the 21st Century*, p. 217; P. Isherwood, *Legal & Business Issues in the Music Industry -1998 Review & Analysis*, pp. 40-41. This practice has been explicitly pointed out by T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht- Kommentar*, §85, para. 3. In these cases, the independent music producer carries the risk and concludes in his own name. He then assigns the rights via a Bandübernahmevertrag.

¹⁷⁶ The famous 1990 court case in which three of the ABBA members took their agent and owner of Polar Music to court as they demanded more royalties is a clear indication of this.

¹⁷⁷ G. Hull, T. Hutchinson and R. Strasser, *The Music Business and Recording Industry- Delivering Music in the 21st Century*, p. 217.

¹⁷⁸ R. Salmon, 'A Guide to Contracts for Producers', *Sound on Sound* (available at <http://www.soundonsound.com/sos/jul08/articles/agreements.htm>, last accessed 31/8/15).

3.3.2 Conclusion

In summary, the fixation of sound in a medium capable of replaying it is protected under the neighbouring right for phonograms. The rights are granted to the producer which can be either a legal or a natural person although the former is preferred under the national rules examined here. In order to gain protection though, the phonogram has to show a minimum of labour and investment. The standard shows some minor national variation but in essence any targeted recording activity is likely to be covered. In addition, protection is not automatic. The producer has to be a national of an international agreement covering phonograms (all of the EU member states fulfil this criterion) and the phonogram has to be either made or first published within a member state- depending on the national provisions. Germany and the UK allow for both routes. In practice, the rights in the recording of a musical performance are usually owned by the record label. At the same time, performers and producers have royalty rights. It should be noted here that while the record label owns the rights in the record, it does not usually own the rights in the underlying song. Vice versa, while the publisher owns the rights in the song, it does not usually own the rights in the recording.¹⁷⁹ As a result of industry practice, it will be those (usually legal) persons that can exploit the subject matter commercially which will hold the right. In the context of phonograms, this will be the record label.

	Phase 3
Subject Matter of Protection	Phonogram
Default Ownership	Producer
Practical Ownership	Record Label

Graphic 5: Summary of the neighbouring rights provisions and industry practice in relation to phonograms.

3.4 Phase 4: Packaging and Distributing the Subject Matter for Consumer Market

At this stage now, there is a product (the recorded song on a phonogram) which needs to be distributed for the consumer market. There are several ways that this happens in relation to music. The first one is to combine the song with other ones and release it as an album. The second way is to use the individual song and broadcast it over the radio or the Internet, especially in the digital age.

Whenever the song is distributed in a physical medium, it is common industry practice to add some additional packaging. Albums, for example, are often accompanied by a range of materials when they are brought into circulation. In practice, this includes booklets with text and images as well as the cover art which is on the outside of the product. This packaging is relevant from a copyright point of view because these materials can also be subject to copyright protection in their own right. In general, any text included in the booklet or the case can potentially be considered literary works as discussed above. They just have to meet the definition and originality threshold as previously described.¹⁸⁰ However, art work and images do not fall into this category. Instead, they are considered artistic works under copyright law.

¹⁷⁹ P. Isherwood, *Legal & Business Issues in the Music Industry -1998 Review & Analysis*, p. 34.

¹⁸⁰ See section 3.1.2 Literary Work.

3.4.1 Art Works

Art works are considered copyright works within the EU. As was the case with other copyright works discussed here, EU law does not provide its own distinct definition. Rather, it is again the Berne Convention one needs to rely on. The Berne Convention lists a number of works of artistic character:

*'The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as ... works of drawing, painting, ... sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.'*¹⁸¹

From this list, a few components can be clarified. First, there are a number of different ways an art work can be expressed, ranging from traditional methods such as painting to newer technological processes including photographs. They are listed separately here and it can therefore be expected that at least some signatory states will do the same. As a result, what we consider art may not all be considered an art work under copyright but may fall into a number of distinct work types. Secondly, the protection is extended to both two and three dimensional works. It therefore includes sculptures as much as it does an oil painting. Thirdly, protection also extends to works of applied art: it also covers art in the practical sense such as is found in everyday objects, for example furniture. In summary, art works under the Berne Convention is a wide term which includes everything from traditional to modern to applied art.

The differences in how art works are defined and possible adjacent categories becomes clear when a common and a civil law country is compared. The UK (a common law country) defines artistic works as

- (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,*
- (b) a work of architecture being a building or a model for a building, or*
- (c) a work of artistic craftsmanship.*¹⁸²

This is subject to its usual originality standard as the other copyright works discussed here are. As a result, these definitions cover any kind of artistic work, ranging from paintings to drawings to illustrations- including preparatory work. It also includes graphical works, photographs as well as three-dimensional works such as sculptures and buildings.¹⁸³ The only criterion is that it is visually significant but it does not refer to artistic merit of any kind.¹⁸⁴

¹⁸¹ Berne Convention, art. 2(1).

¹⁸² s.4(1) 1988 CDPA.

¹⁸³ s.4 1988 CDPA.

¹⁸⁴ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 3-55 and 3-56. As long as there is some choice of camera angle, lighting etc, the photograph is to be held original. *Antiquesportfolio.Com Plc v Rodney Fitch & Company Limited* [2001] E.C.D.R. 5 at 58.

Germany takes a more differentiated approach to art works. It refers to: ‘Artistic works, including works of architecture and of applied art and drafts of such works...’¹⁸⁵The definition includes art works irrespective of their form, including two- and three- dimensional works.¹⁸⁶ However, not everything that someone may consider art is necessarily an artistic work in the sense of copyright law.¹⁸⁷ As with other copyright works, artistic works have to meet the originality threshold. In particular, an art work has to reflect compositional choice (*Gestaltungsmöglichkeit*), meaning that the work could have different shapes. Although there is no clear delineation of the term, factors such as form and the artistic intent have been used.¹⁸⁸ As a result, designs which are technological-functional and could not have taken a different form are excluded.¹⁸⁹ Under German law, works can be protected as artistic works even if they are not primarily perceived as such by the audience. This category includes works which have an everyday function, such as furniture. However, the level of *Gestaltungsmöglichkeit*, meaning the form was determined by the artist rather than dictated by the function, is difficult to cross in practice.¹⁹⁰ The UK also protects this kind of works (artistic craftsmanship).¹⁹¹ Nonetheless, despite the harmonization of originality at EU level, the UK maintained its broad interpretation of originality, making it a lower standard in practice than in Germany in this context.¹⁹² It is therefore likely that more works are covered.

Special attention has to be paid to the protection of photographs. Photographs differ from other art works because they are essentially the result of a technical process. In the UK, they are considered artistic works. However, German law does not see them as artistic works but instead provides two distinct categories for photographs. If they meet the required level of originality, they are seen as copyrightable and considered original photographic works.¹⁹³ Photographs which do not meet the required level of originality are still protected but as a neighbouring right (*Lichtbilder*) rather than a copyright work.¹⁹⁴ Having said this, the actual level of protection is the same as they are both subject to the provisions covering copyright works,¹⁹⁵ just as artistic works are.

In relation to Europeana, artistic works include such things as album cover art, images within booklets, drawings and sketches, paintings and photographs of events/ activities as well posters and similar pieces.

As with soundscapes, it is possible that some of the artistic material is in itself a reproduction of an art work, for example a photograph of a painting. In the UK, the photograph here is a derivative work and its copyright can therefore not be exercised independently because by its nature, it also reproduces a substantial part of the underlying work.¹⁹⁶ Similarly, Dreier emphasises that German copyright law provides the copyright owner in the underlying art work with the right to control

¹⁸⁵ § 2(4) 1965 UrhG.

¹⁸⁶ The definition specifically includes architecture and other works of applied art.

¹⁸⁷ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 2 para. 149.

¹⁸⁸ OLG Celle ZUM 2011, 341, at 344

¹⁸⁹ H. Ahlberg and H.-P. Götting, *Urheberrecht*, §2 para. 23-24.

¹⁹⁰ H. Ahlberg and H.-P. Götting, *Urheberrecht*, §2 para. 29.

¹⁹¹ s.1(c) 1988 CDPA.

¹⁹² Even a photograph is protected as long as a minimum of judgement is used by the photographer. *Antiquesportfolio.com Plc v Rodney Fitch & Co Ltd* [2001] E.C.D.R. 5 at 29-39.

¹⁹³ § 2(5) 1965 UrhG.

¹⁹⁴ § 72 1965 UrhG.

¹⁹⁵ H. Ahlberg and H.-P. Götting, *Urheberrecht*, §3 para. 31.

¹⁹⁶ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 4-12.

reproductions as well as their further use.¹⁹⁷ This issue is especially relevant when works of applied art or artistic craftsmanship have been photographed or reproduced in some other way. European institutions' archives include photographs of equipment or furniture or similar items are to be digitised. It is possible that there is a second copyright work¹⁹⁸ within these and it would require a separate license. In summary, digitising these kind of works requires a license not only from the artist that made the copy (e.g. photographer) but also the copyright owner of the underlying art work.¹⁹⁹

3.4.1.1 Ownership

Under EU law, art works are subject to the Creator Doctrine. Therefore, they have to meet the originality threshold defined within the EU (an author's own intellectual creation). Furthermore, first ownership is granted to the author, namely the creator of the work. As a result, if an image or photograph is considered original according to EU standards, it will be the author who owns the rights. However, if the work fails to meet the originality threshold, for example *Lichtbilder* under German law, the rights are owned by the maker.²⁰⁰

Furthermore, transitional ownership rules still apply in both Germany and the UK for photographs. In both cases, the ownership has to be assessed in line with the act in force at the time in both Germany and the UK.²⁰¹ In the UK, photographs, portraits (drawn or painted) and engravings taken or made between 1 July 1912 and 1 August 1989, the author is the person who owned the material on which the work was made- or in other words, the person who ordered or commissioned the making of the work in return for pay.²⁰² As a result, the author and owner of the copyright is likely to be the employer rather than the artist.²⁰³ The same applies to commissioned art works. Art works made between 1 June 1957 and 1 January 1989 are owned by the commissioner if an art work, in particular a photograph, engraving or painting/ drawing of a portrait, was commissioned and made in return for money or money's worth.²⁰⁴

The rules apply to any photograph, any engraving as well portraits, drawn or painted. This section only applies unless there was no contract to the contrary.²⁰⁵ The 1911 UK Act had the same rule although expressed in slightly different words. It uses the term valuable consideration²⁰⁶ rather than money's worth. Valuable consideration is broader in meaning because it includes any kind of 'right, interest, profit or benefit accruing to one party' or alternatively 'some forbearance, detriment,

¹⁹⁷ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 16 para. 10. Whereas making the reproduction can be permissible under certain circumstances, the further exploitation does require consent.

¹⁹⁸ Alternatively, a design right could exist but this is beyond the scope of this report.

¹⁹⁹ That is unless contractual terms do give the secondary artist the right to control its further uses.

²⁰⁰ §72 1965 UrhG.

²⁰¹ When the copyright was reformed at the time, ownership for works already in existence were maintained to ensure that individuals to facilitate legal certainty and respect for property.

²⁰² s.5(1)(a) 1911 Copyright Act and s.4(3) 1956 Copyright Act.

²⁰³ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 4-29.

²⁰⁴ s.4(3) 1956 Copyright Act.

²⁰⁵ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-33.

²⁰⁶ '...where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright...'. s.5(1)(a) 1911 Copyright Act.

loss or responsibility given, suffered, or undertaken by another'.²⁰⁷ Therefore, as soon as one side gains a benefit of any kind or the other side suffers a detriment of any kind, valuable consideration is given. The notion of value is relevant as for example photographs being taken of famous personalities were seen to fall within this definition,²⁰⁸ while those of non-famous individuals was not.²⁰⁹

In Germany, owners of photographs keep their rights if the works were made before the law took effect (1/1/1966),²¹⁰ although their status under the law may change.²¹¹ In particular, Germany started to distinguish between original and non-original photographs (*Lichtbildwerke v Lichtbilder*), in essence adding a neighbouring right for non-original photographs, in 1965. The key distinction between the two is that *Lichtbildwerke* have an author while *Lichtbilder* only have a maker, reflecting the lack of originality and emphasising the technological component of the photograph. As a result, the types of subject matter are also distinguished by significantly differing terms of protection.²¹²

3.4.1.2 The Art Industry

It is possible that the CHI archives contain art works not directly associated with the commercial exploitation in the music business but instead linked to a relevant artist or setting. The common industry arrangements are strongly indicative of rights ownership and therefore important for the licensing.²¹³ It is therefore prudent to provide an overview of how the creative market for art works is organised more broadly before finishing with an analysis of art in the music business.

The commercial exploitation of art works follows two distinct trajectories. First, there is the sale of the original art work. This is usually done by galleries which act as the agent of the artist by exhibiting his works and generating interest in it. A contract for promotion and the sale of the art work both do not usually include the copyright in the work.²¹⁴ This means that the copyright in original art work is likely to stay with the artist. The second path to exploitation is the reproduction of the art work in other works, such as illustrated books. In the case of pre-existing works, it is most common for the author of the secondary work to license its use. If not, then the rights holder of the secondary work would have bought the relevant exclusive rights and therefore would also be able to license it further. Thirdly, the art work can be commissioned or it was created in the case of employment. As a result, the copyright ownership may shift. As discussed before, the ownership of the relevant rights is determined by the contract and is assigned to the employer. Older photographs in particular can be subject to very strong employer rules.

In the context of the music industry, art work for an album raises the possibility that the works were not created independently. Their ownership is dominated by the circumstances in which they were created. The copyright in works created in employment are to some extent owned by the

²⁰⁷ *Fleming v New Zealand Bank [1900] A.C. 577* at 585.

²⁰⁸ *Melville v Mirror of Life Co [1895] 2 Ch. 531*.

²⁰⁹ *Ellis v Marshall (H.) & Son (1895) 64 L.J.Q.B. 757*.

²¹⁰ § 135 1965 UrhG.

²¹¹ BVerfG GRUR 1972, 491 – *Schallplatten*.

²¹² 70 years after the death of author for photographic works but only 25 years after the release of the *Lichtbild*.

²¹³ Licensing is discussed in detail in chapter 4: Licensing Works.

²¹⁴ It has been long held that the sale of an art work does not automatically entail a transfer of copyright.

employer.²¹⁵ As a result of these provisions, it is likely that if a record label has employed or commissioned the author of the materials used in a booklet or similar material, the relevant exploitation rights will be held by the record label. The record label will therefore also be able to license its digitisation and making available online. If the record label has only licensed pre-existing works, it depends on the specific contractual terms if they can license it on their own. In these cases, another license from the right holder may be required. Going back to our example of Mamma Mia, the original LP had a photograph as a cover which is credited to Olga Lager. The actual ownership in this case can also not be determined upfront without contacting the record label for example. In sum, there are three likely right holders: the artist, the employer/ commissioner or an exclusive licensee.

3.4.1.3 Summary

In summary, art works can take a variety of different forms- some of which are considered distinct copyright works depending on the national legislation. These distinctions are in practice most relevant in the context of photographs because of the technical component they include. Civil law countries in particular treat technical subject matter in a more differentiated way. This is for example reflected in Germany’s distinction between original and non- original photographs whereby the latter is only considered a neighbouring right.

Phase 4	
Subject Matter of Protection	Art Work
Default Ownership	Author
Practical Ownership	Record Label/ Author

Graphic 6: Summary of the copyright provisions and industry practice in relation to art works.

As all copyright works, art works are subject to the Creator Doctrine. This includes the EU-wide minimum originality threshold as well as first ownership by the author and therefore creator. However, art work is different from other copyright works because its usual exploitation does not include copyright transfers in the same way as is common practice for example in respect of musical or literary works. A sale of the art work does not usually include any copyright transfer. This has repercussions for the music business as the copyright ownership, especially of pre-existing works, which were used for example as album or cover art strongly depends on the individual contractual situation. Given the age of many European Sounds materials, this can lead to the specific problem associated with older contracts.²¹⁶

²¹⁵ It should be noted that older works may be owned by the employer anyway under transitional rules. This is especially relevant for photographs.

²¹⁶ For a more detailed discussed of copyright terms, please see For a detailed report on calculating the term of protection and remaining national variation, see for example C. Angelopoulos and C. Jasserand, ‘Public Domain Calculator- Report and Documentation’.

3.4.2 Broadcast

In addition to releasing the song on a physical carrier that can be bought in a store and then listened to at home for example, it is also common practice to broadcast music, either by radio or online. In the case of a radio broadcast, the recorded performance will be transmitted to the listening public. Just as with making a record, making broadcasts on the radio is costly as it includes for example maintaining the relevant infrastructure and the effort and skill in making the broadcast. To ensure that investors are willing to take these risks, they are provided with a neighbouring right to safeguard their labour and investment: the broadcasting right.

According to the WPPT, a broadcast is '*...the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof...*'²¹⁷ This is essentially the same definition as in the Rome Convention.²¹⁸ The subject matter 'broadcast' is not defined at EU level beyond this but its core is the activity of transmitting something and especially the effort and investment necessary to do it. This is reflected in how member states approach it. It is therefore the national definition of originality which applies.

In the UK, broadcasts are defined as

an electronic transmission of visual images, sounds or other information which—

(a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or

*(b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public,*²¹⁹

The focus is on the actual transmission and not the copyrighted works which may form its content. It should also be noted that the means of transmission are technologically neutral.²²⁰ Subsection 1A explicitly excludes concurrent transmissions of live events; a simultaneous internet transmission; or transmission of moving images (film) or sound under the control of the person making the broadcast. As a result, there is no independent broadcasting right if a film is re-broadcast for example.²²¹ There is also no originality requirement attached beyond the traditional labour and investment.²²²

Germany protects broadcasts as a neighbouring right. The focus of protection is on the content of the broadcast in the context of the specific broadcasting event²²³- but does not include the underlying copyright work. It should be noted that the subject matter needs to be broadcast to

²¹⁷ WPPT, art 2(f).

²¹⁸ Rome Convention, art 3(f).

²¹⁹ s.6 1988 CDPA.

²²⁰ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 3-93.

²²¹ If this was not to be the case, a broadcaster would gain an exclusive license after the first broadcast because any further broadcast would be bound to infringe the first broadcaster's rights.

²²² N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 3-151.

²²³ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 87 para. 9.

the public for protection to arise.²²⁴ Therefore, Germany also protects the actual transmission. There is no originality requirement attached as the protection is based on the investment and effort.

3.4.2.1 Ownership

First ownership in broadcasts is harmonised at EU level to the extent that both the Term Directive and the Information Society Directive refer to the rights of broadcasters.²²⁵ How these are defined varies though, depending on if they are considered a copyright work or a neighbouring right.

Following the division between copyright and neighbouring rights, the owner of the right is labelled differently. The UK provides copyright protection to the author of a broadcast, meaning the person who makes it.²²⁶ Referring back to the 1988 CDPA, more detail is provided on the meaning of this term.

References in this Part to the person making a broadcast or a transmission which is a broadcast are—

(a) to the person transmitting the programme, if he has responsibility to any extent for its contents, and

(b) to any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission;

In essence, the author is either the person creating the broadcast or the person who transmits it as long as he has control over its content.²²⁷ As Bently and Sherman emphasise, this refers in practice to the entrepreneur as the person who made the arrangements necessary for transmitting the work.²²⁸ In difference to the UK though, the beneficiary of protection in Germany is comparatively straight forward. The act directly refers to the broadcaster²²⁹ and assumes that the identity of this actor is clear. It therefore does not provide a detailed definition of the potential right holder. In practice though, both Germany and the UK protect the same (legal) person.

Since the protection of a broadcast is not based on its content but on the investment made in broadcasting the work (meaning that is protected separately from the actual content), it is not possible for a broadcast to have not been communicated to the public. There are therefore no unpublished broadcast. This consideration is especially relevant to documentaries made for either radio or TV. Instead, the protection for broadcasts is essentially an additional layer of protection.

The broadcasting rights are not commonly transferred to any other party. When works are broadcast by TV or radio, the broadcasting organisation will commonly remain the owner of the rights related to the broadcast. On closer examination, there is no independent market for selling broadcasts. Let's assume that a song is broadcast over the radio. This would usually entail playing a record. The rights in the record and the song are already held by commercial exploiters. There is no

²²⁴ Wahrnehmbarmachung under §§ 19, 21, 22 1965 UrhG or making available online §19a 1965 UrhG are not sufficient. T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 87 para. 10.

²²⁵ Term Directive, art. 3 and 4; InfoSoc Directive, art. 2(e).

²²⁶ s.9(2)(b) 1988 CDPA.

²²⁷ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 4-62.

²²⁸ L. Bently and B. Sherman, *Intellectual Property Law* (Oxford, Oxford University Press, 2009, 3rd ed.) p. 125

²²⁹ § 87 1965 UrhG.

need for them to control the fixation of a broadcast as well. Exploiting the broadcast commercially would automatically infringe the copyright in the underlying work.

3.4.2.2 Summary

In summary, when a work is broadcast on the radio or online, the broadcasting organisation is granted protection in the fixation of this broadcast. The protection however only refers to the transmission as such and not the work which is included in it. As a result, the protection forms an additional layer on top of the works and rights created before or separately from it. Furthermore, given the narrow focus of the protection, the rights are not directly relevant to the commercial actors in the field. As a result, it is unlikely that the rights are assigned to another actor. They usually remain with the broadcaster.

Phase 4	
Subject Matter of Protection	Broadcast
Default Ownership	Broadcaster
Practical Ownership	Broadcaster

Graphic 7: Summary of the neighbouring rights provisions and industry practice in relation to broadcasts.

3.4.3 Conclusion

The distribution of musical works and performances varies depending on the how the distribution is done. The song, performance and record are often distributed as a physical medium, for example a CD. In these circumstances, the record is often accompanied by additional material, such as booklets. These added materials are themselves relevant for copyright protection. While written text is most likely protected as literary works, art works form their distinct categories of works. Both of these are copyright works and therefore subject to the Creator Doctrine. Both originality and creator ownership are therefore applicable. However, in civil law countries special attention has to be paid to photographs and their level of originality. While ownership in literary works is commonly assigned, the scope for transfer is traditionally narrower for art works. The rights ownership crucially depends on when and in which circumstances the work was created. There is a reasonable chance that works were either commissioned or licensed for use, leaving the actual rights with the artist.

Alternatively, if the distribution is done by broadcast, an additional neighbouring right is created in the transmission. The broadcaster, usually a legal person, is rewarded for his investment by allowing him rights over the first fixation and reproductions thereof. The protection nonetheless only covers the transmission and not the underlying works, making it a separate and additional layer of protection. In terms of ownership, the rights are likely to stay with the broadcaster.

Phase 4			
Subject Matter of Protection	Literary Work	Art Work	Broadcast
Default Ownership	Author	Author	Broadcaster
Practical Ownership	Record Label	Author/ Record Label	Broadcaster

Graphic 8: Summary of the neighbouring rights provisions and industry practice in relation to phase literary works, art works and broadcasts.

3.5 Adaptations of Musical Works

The discussion so far has focused on the traditional notion of the musical business: producing a song and exploiting it in the commercial music market. While this is the staple of the industry, there are now ways in which songs are exploited which do not follow this traditional pattern. Let’s go back to our example of Mamma Mia by ABBA. On the basis of this song’s success and the band’s music as a whole, a musical and then a film was made. These both rely strongly on ABBA’s music but form copyright and neighbouring rights in their own right.

3.5.1 Performance on Stage

In 1999, Catherin Johnson adapted ABBA’s greatest hit into a musical. In terms of copyright, this is significant because by doing so, she created an additional copyright in addition to the rights already existing in the songs- as discussed before. A musical is essential a series of songs connected by a story line which is designed to be performed on stage. In copyright terminology, this is a dramatico- musical work.

The previous section has discussed the copyright provisions as they would apply to songs. Some musical works are meant to be performed on stage, such as an opera or a musical. In these cases, the music, lyrics are in practice supplemented by the instructions for stage performance which can gain its own copyright.

As with musical and literary works, the protection of works designed to be performed on stage has to be interpreted on the basis of the Berne Convention. In terms of on stage works relevant to Europeana Sounds, it refers to two things: dramatic or dramatico- musical works and choreographic works. It states that:

*“The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression,...dramatic or dramatico-musical works; choreographic works”*²³⁰ It is clear from this, that the Berne Convention considers

²³⁰ Berne Convention, art 2(1).

the literary, dramatic and choreographic works as distinct from each other as well as distinct from musical works. However, as with literary works, not all member states have decided to follow the same demarcations. In fact, looking at the national definitions in the UK and Germany provides an insight into how the variation can look like in practice.

The UK treats creative works designed to be performed as a separate category of copyright works, called dramatic works. To be classified as a dramatic work, it is first required that the work is a 'work of action or to be performed in front of an audience'.²³¹ A degree of certainty of the subject matter is required.²³² In practice, it has been held that a dramatic work 'must have sufficient unity to be capable of performance'.²³³ The individual components and how they link have therefore to be present in enough detail, for example via stage instructions, to make the performance possible and identifiable. The piece does not have to be written out in extensive detail though.

The German approach to visually performable works varies significantly. German copyright law does not have a separate category of works for dramatic pieces. Instead, it protects the underlying script as literary works. Any assessment here would therefore have to be done under the rules for literary works. However, it has also been argued that the director can have an independent copyright, if his interpretation of the work shows the required level of originality.²³⁴ If one follows this interpretation, the copyright works exist in the same piece with different owners: the director as well as the author of the underlying work.²³⁵

However, a major issue can arise in the context of dances. In the UK, dance is protected as a dramatic work.²³⁶ It explicitly states in the definition that it 'includes a work of dance or mime'.²³⁷ As the word 'includes' shows, the description is not exhaustive but covers all works with a similar character. This means that the requirements for protection are those of dramatic works such as certainty of content. In practice, a traditional dance can be protected as long as the actual dance is not copied, it represents an expression of the author and the instructions are sufficiently coherent to allow for the performance.

Dances in Germany however are not included in the category of literary works but are instead covered by a separate category of works, based on a distinct rationale. German copyright law protects dances or pantomimes as an expression of feelings and thoughts.²³⁸ It is this purpose which is key to protection while skill as such is not a determining factor.²³⁹ Even if the performance is very skilful but not an original expression, protection is not provided. The key is the interpretation of the music via the dance. If the music can be exchanged, for example in competitive dancing, then this

²³¹ *Nova Productions Ltd v Mazooma Games Ltd* [2006] E.M.L.R. 14; [2006] R.P.C. 14, at 338

²³² *Nova Productions Ltd v Mazooma Games Ltd* [2006] E.M.L.R. 14; [2006] R.P.C. 14, at 338

²³³ *Green v Broadcasting corp of New Zealand* [1989] R.P.C. 700, at 702; N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 3-43.

²³⁴ These would be protected as either an adaptation (§3 1965 UrhG) or *sui generis* (§ 2(2) 1965 UrhG). A. Wandtke and W. Bullinger, *Praxiskommentar zum Urheberrecht* (München: C.H.Beck, 2014, 4th ed.), §2, para. 55. This has been previously denied.

²³⁵ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 3 para. 50.

²³⁶ s.3(1) 1988 CDPA.

²³⁷ s.3(1) 1988 CDPA.

²³⁸ § 2(1)(3) 1965 UrhG.

²³⁹ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, §2 para 147.

requirement is not met.²⁴⁰ While traditional dances can be protected, it cannot be movement for the sake of it.²⁴¹ If they are a reflection of skill rather than expression, then traditional dances may not benefit from copyright protection under German law. In summary, how and to what extent dances are protected under national law varies significantly, in particular in respect to the underlying requirements for protection. The scope will most likely be broader in the UK than in Germany as a result of the varying interpretation of what originality means in the context of dancing.

3.5.1.1 Ownership

Dramatic works, dances and other works designed to be performed on stage are copyright works and therefore subject to the Creator's Doctrine. The rules are therefore the same as discussed above. It should be noted here that the commercial exploitation of musicals tends to vary from other copyright-based industries. In particular, it is significantly less likely here that the rights are assigned as a whole to an intermediary. If the work was designed to be performed on stage, their original purpose was the live performance on a stage rather than recording. This includes especially dramatic works and works of dance. In these cases, usually all of the contractual arrangements as they are concluded focus on getting the work on stage. As a result, the director and choreographer assign their rights to the producer only to the extent that this is necessary for the live performance.²⁴² All other rights are usually reserved. In fact, any recording and transmission has to be negotiated separately.²⁴³

3.5.1.2 Summary

If the work was designed to be performed on stage, a separate copyright is created. The precise nature depends on the type of work in combination with national provisions. In Germany, a dramatico- musical work will be protected as a literary work in addition to the musical and literary protection for the music. Dances will be protected separately as choreographic works. In the UK, the dramatico- musical work will benefit from protection as a dramatic work which includes any choreographic works. This protection is also granted in addition to the musical and literary works created by the songs themselves. In terms of ownership, it is likely that some rights remain with the author as the traditional contractual structure even for commercially exploited works is less likely to entail a complete assignment of rights. As a result, the rights ownership at this stage would look like this:

²⁴⁰ H. Ahlberg and H.-P. Götting, *Urheberrecht*, §2 para. 17.

²⁴¹ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, §2 para. 147.

²⁴² M. Murza, *Urheberrecht von Choreografen* (Berlin: Walter de Gruyter, 2012), p. 306; In the case of more successful plays, the producer may have an option to acquire ancillary rights in the UK. N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 26-305. Collective agreements are not available for Germany and the UK.

²⁴³ Off Broadway League, *Off Broadway League Collective Agreement US* (available at <http://www.offbroadway.org/images/files/pdfs/OB14-19%20from%20SDC%20Website.pdf>, last accessed 31/8/15), chapters XV B) and C); Broadway XV B).

Phase 1				
Subject Matter of Protection	Musical Work	Literary Work	Dramatic Work	Choreography
Default Ownership	Author	Author	Author	Author
Practical Ownership	Publisher		Author	Author

Graphic 9: Summary of the neighbouring rights provisions and industry practice in relation to works designed to be performed on phase.

Based on its success as a musical, *Mamma Mia* was also adapted into a film. As with the transition from songs to a musical, the adaptation into a film again created a whole set of distinct copyrights.

3.5.2 Audio- Visual Subject Matter

In addition to phonograms, sounds and images can also be fixated in an audio- visual subject matter. In our example here, this would be the 2008 feature film directed by Phyllida Lloyd and distributed by Universal Pictures, starring Meryl Streep and Pierce Brosnan. The fixation or recording process combines both intellectual creation with technical processes. While the technological process is not original, the final product, in other words its content, can be. As a result, audio-visual subject matter combine both original and unoriginal elements. Both of these are covered by copyright-relevant legislation, however, the precise nature of the protection varies.

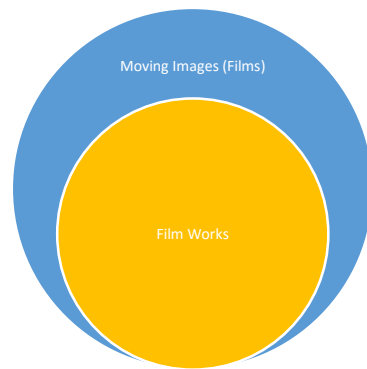
Under EU law, the first fixation of films is protected, irrespective of the level of originality.²⁴⁴ This protection is comparatively basic and falls under the production of neighbouring rights. As a result, the Creator Doctrine is not applicable which explains why the rights are granted to the film's producer.²⁴⁵ The protection here focuses on the technical process that merits protections. The final film does not have to reflect intellectual creation. Having said this, none of this means that the subject matter cannot also be original in the sense required by copyright. To account for this, films can additionally be protected as film works. As with all copyright works, the protection is defined by the Berne Convention. It lists cinematographic works among the types of works to be protected.²⁴⁶ However, it also contains a deviation from the usual Creator Doctrine that it usually applies: it leaves the question of authorship up to the member states.²⁴⁷ So the international provisions in essence provide for the option that a film can be original in nature but leaves the question of authorship unregulated.

²⁴⁴ InfoSoc art. 2(d), art 3(c).

²⁴⁵ InfoSoc art. 2(d), art 3(c).

²⁴⁶ Berne Convention, art 2(1).

²⁴⁷ S. von Lewinski, *International Copyright Law and Practice*, para. 5-88.



Graphic 10: The relationship between moving images (films) and film works.

On this basis, the terms of originality and authorship have been supplemented with specific EU provisions. To be considered a film work, the final product has to be an author's own intellectual creation as defined in the *Infopaq* decision and confirmed by *Softwarová*. However, the question of who the creator and therefore author is only partially harmonised at EU level. Under EU law, a film work has to have at least the principal director listed as the author and therefore creator. Other contributors can be considered authors in addition to this.²⁴⁸ Taking a look at who is to be considered to calculate the term of protection for a film work reveals a significant number of other contributors which could be considered authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of the music (if it has been written specifically for the film).²⁴⁹

In summary, under EU law there are two distinct sets of protection: the first fixation owned by the producer and the film work owned by the author. Economically speaking, creative authorship is not a full reflection of how a film is made. As a result, the second major player is the film producer. However, it also does not prescribe exactly how its member states resolve the tension between the technical and the creative component in a film. All member states are required to do is ensure that the principal director is one of the authors in the film work and the producer has the rights in the first fixation of a film (not necessarily a film work). Depending on the conceptualisation of copyright, this person is either considered another author or protected separately via a neighbouring right. Looking at the provisions in Germany and the UK reveals clearly how this minimum harmonisation has impacted on films, film works and their ownership.

3.5.2.1 UK

The UK is a common law country and as a result does not have a strict separation between copyright and neighbouring rights. This is most visible in the protection of films which is characterised by a very wide definition of films and labelling the producer a co-author. In the UK, films are copyright works and defined as 'any moving image recorded on any medium'²⁵⁰, regardless of how the film is made. Moving pictures of any kind are likely to be protected as a film work. A particular aspect merits highlighting. The sound track is included in the film.²⁵¹ This means that when

²⁴⁸ Term Directive, art. 2(1).

²⁴⁹ Term Directive, art. 2(2).

²⁵⁰ s.5B(1) 1988 CDPA.

²⁵¹ s.5B(2) 1988 CDPA.

a film sound track is copied as part of the film, it is considered copying the film, not the sound recording.²⁵²

The UK did not provide for a separate film copyright until 1/6/1957.²⁵³ Furthermore, the copyright owner of a film made before the 1988 Copyright Act that has included a sound track is considered the owner of the sound recording while the film’s author is considered the sound track’s author. In the 1988 CDPA, the UK originally only assigned the producer of the film, defined as the person who made the necessary arrangements to making the film, as its author and copyright owner.²⁵⁴ Today, the UK has implemented the EU Directive and now declares the producer and the director as the authors.²⁵⁵ It therefore considers them joint authors of the work, rather than creating two individual regimes of protection.²⁵⁶ It should be noted in this context that the change in authorship has been back-dated to the 1/7/1994 although the act only entered into force on 1/12/1996.²⁵⁷ Furthermore, given the general rules as to transitional provisions, the ownership of films made between 1989 and 1994 stays solely with the producer. It should also be noted here that the extended term of protection from 50 years to 70 years for all film works, granted in 1996, benefits the principal director’s estate.²⁵⁸

Time Frame	Copyright Ownership Over Time
Prior to 1/6/1957	No independent copyright protection for films
1/8/1989-30/6/1994	Copyright owned solely by the producer
1/7/1994-	Copyright co-owned by producer and director

Table 2: Overview of copyright ownership in film works over time in the UK.

3.5.2.2 Germany

In difference to this, Germany distinguishes between film works (*Filmwerke*) and moving images (*Laufbilder*), based on the level of originality. A film work uses accompanying works (literary works, sounds) and merges them into a separate category of copyright works,²⁵⁹ as long as they meet the originality threshold.²⁶⁰ This category also includes all works which are made in a similar way as a film work.²⁶¹ For example, even a video game can qualify as film works.²⁶² If the originality requirement for a film work are not met, then neighbouring rights protection is still granted as

²⁵² N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 7-80 and 3-78.

²⁵³ Instead, they were protected as photographs. For films made before 1/6/1957, it is therefore necessary to apply the provisions on photographs as described in 3.4.1 Art Works. The script, on the other hand, was protectable as a dramatic work, see 3.5.1 Performance on Stage.

²⁵⁴ s.9(2)(a) 1988 CDPA.

²⁵⁵ s. 9(2)(ab) 1988 CDPA. It should be noted that the usual provision relating to works created in employment also applies. (s.11-2).

²⁵⁶ CDPA s.10(1)(1A).

²⁵⁷ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 4-51.

²⁵⁸ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-139.

²⁵⁹ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 2 para. 204.

²⁶⁰ OLG Köln GRUR 1992, 312, 313 – *Amiga-Club*. They can also be protected as computer games.

²⁶¹ §2(6) 1965 UrhG. The aim is technical neutrality.

²⁶² The influence a player exerts on the course of the game is irrelevant as all possible outcomes have been programmed before. OLG Hamburg GRUR 1983, 436 – *Puckman*, at 437.

moving images (*Laufbilder*).²⁶³ The required level of originality is not to be understood as artistic quality though. Rather, any movie designed as such is likely to meet this threshold, as it would involve the collection, selection and arrangement of materials.²⁶⁴ For example, if an interview is recorded but the resulting film shows no individuality or conscious choice by the person recording it, it will be considered a *Laufbild* rather than a film work. Similarly, the recording of a theatre production²⁶⁵ or of the documented item would not be considered a film work.²⁶⁶ However, a documentary movie featuring several interviews or a recording of a drama using several angles is likely to meet the requirements of a film work.

For *Filmwerke*, the authors of a film include the director, author of the script, author of the dialogues as well as the sound track's composer. It should be noted that this list is not exhaustive and more individuals can be considered creators.²⁶⁷ The rights of the producer are considered a neighbouring right.²⁶⁸ The film producer is the person who made the organisational arrangements required to make the film²⁶⁹ and carried the financial risk of the production.²⁷⁰ Who took the initiative or had the idea for a project is not relevant in this context.²⁷¹ It should be noted that producers of films that have been created before 1966 are not protected unless their work was still protected in another member state on 1/7/1995- then the copyright is revived.²⁷² Furthermore, *Laufbilder* lack the originality and therefore do not have a creator or author. Instead, all rights are granted to the producer of the film.²⁷³

In terms of Europeana, this category would include any kind of moving images, such as recorded interviews, documentaries, films in the traditional sense or a recording of everyday life on a market or nature films. Nonetheless, it can therefore be noted that documentary movies involving the conscious choice and arrangement of materials will be most likely considered copyright works and benefit from protection as such in both Germany and the UK. Recordings of oral history or dances or traditional music which do not show this kind of selection however will usually only be

²⁶³ § 95 1965 UrhG.

²⁶⁴ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, §2 para. 209.

²⁶⁵ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 2 para. 209.

²⁶⁶ Einem Film, der auf das Einfangen der naturgegebenen Wirklichkeit, nicht gestellter Bilder, abzielt, kann - neben dem fotografischen Urheberrecht an den Einzelaufnahmen - ein Urheberrechtsschutz als Film werk nur zugebilligt werden, wenn er sich nicht in der bloß schematischen Aneinanderreihung von Lichtbildern erschöpft, sondern sich durch die Auswahl, Anordnung und Sammlung des Stoffes sowie durch die Art der Zusammenstellung der einzelnen Bildfolgen als das Ergebnis individuellen geistigen Schaffens darstellt. BGH GRUR 1953, 299, at 301- 302- *Lied der Wildbahn I*.

²⁶⁷ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, §7 para. 7. See also the case where a sound mixer was considered an author. BGH IIC 2003, 839- *Sound Mixing Engineer*.

²⁶⁸ § 94 1965 UrhG.

²⁶⁹ OLG Köln GRUR-RR 2011, 161-WAAhnsinn – *Der Wackersdorf-Film*. Entscheidend ist danach, wer die wirtschaftliche Verantwortung und die organisatorische Tätigkeit übernommen hat, die erforderlich sind, um den Film als fertiges Ergebnis der Leistungen aller bei seiner Schaffung Mitwirkenden und damit als ein zur Auswertung geeignetes Werk herzustellen'.

²⁷⁰ BGH GRUR 1993, 472- *Filmhersteller*, at 472.

²⁷¹ LG München I ZUM 2008, 161, at 163.

²⁷² T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 94 para. 50.

²⁷³ § 95 1965 UrhG, refers back to § 94 1965 UrhG.

considered copyright works in the UK. In Germany, they are likely to be classified as moving images and therefore be protected as a neighbouring right. Getting copyright clearance generally includes the accompanying music and sounds. Having said this, if film music is not part of film when it is reproduced but is in the medium of a recording instead, then the provisions on sound recordings will apply and a separate permission will be necessary.

3.5.2.3 *The Audio- Visual Industry*

3.5.2.3.1 Producing a Feature Film

The production of commercial films involves a large number of contributors, some of which create their own copyrights or neighbouring rights that are intrinsically linked to the final audio-visual work. The producer needs to control all of the rights in the underlying works to fully exploit the film worldwide. It is therefore not surprising that the assignment of exclusive rights has become industry practice as evidenced by the collective labour agreement which can be found in all areas of film production, including those made for TV. Specifically, the rights in the underlying script are usually assigned by the author to the producer of the film.²⁷⁴ Similar collective agreements exist for other freelance input which assign the rights to the producer.²⁷⁵ Also assigned are copyrights in artistic works which may be created by behind the screen contributors, such as costumes.²⁷⁶ In addition, the producer will also acquire at least the license on the rights to the underlying sounds track.²⁷⁷

Specific rules apply to the ownership of performances used in audio- visual works. Performers in audio- visual works are considered performers in the copyright sense. However, they are less likely to hold the exclusive rights in their performances. In particular, it is presumed in Germany that performers have assigned their economic rights as part of the contract when they participate in making film works. This presumption includes the right to reproduction and to making available online.²⁷⁸ The rights in this respect are therefore most likely owned by the film producer.

²⁷⁴ Writer's Guild GB, *PACT Agreement* (<https://writersguild.org.uk/wp-content/uploads/2015/09/PACT-1992.pdf>, last accessed 11/9/15), ss.34-35 (includes protection of payments via Collective Management Organisations; Writer's Guild GB, *BBC Agreement* (<https://writersguild.org.uk/wp-content/uploads/2015/02/GSA-FINAL-signed-2012.05.22-implemented-2012.08.28.pdf>, last accessed 11/9/15), s.3.1; Writer's Guild GB, *ITV/ STV/ PMA Agreement* (https://writersguild.org.uk/wp-content/uploads/2015/02/ITV-WGGB-PMA-final_with_appendices.pdf, last accessed 11/9/15), s.6.1; Ver.di, *Tarifvertrag für auf Produktionsdauer beschäftigte Film- und Fernsehschaffende (TV FFS)* (<https://filmunion.verdi.de/tarife/++co++a0a66a4c-0b7a-11e4-9afb-52540059119e>, last accessed 11/9/15), art. 3.1.

²⁷⁵ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 26- 254. The actual terms of the agreement are only available to members. Ver.di, *Tarifvertrag für auf Produktionsdauer beschäftigte Film- und Fernsehschaffende (TV FFS)*, art. 3.1.

²⁷⁶ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 26-234; Ver.di, *Tarifvertrag für auf Produktionsdauer beschäftigte Film- und Fernsehschaffende (TV FFS)*, art. 3.1.

²⁷⁷ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 26- 232; Ver.di, *Tarifvertrag für auf Produktionsdauer beschäftigte Film- und Fernsehschaffende (TV FFS)*, art. 3.1. The payment for the soundtrack is not covered by the agreement though in favour of individual negotiation.

²⁷⁸ § 92 1965 UrhG.

This can be interpreted as an exception to the otherwise weak work for hire provisions. Rights in the performances are usually transferred as part of the hiring contract.²⁷⁹ Therefore, at the end of the production process, a producer (and not the director) in the UK and Germany will hold the rights required by European institutions.

The distribution of major feature films in particular often includes major studios, such as 20th Century Fox or Disney.²⁸⁰ If the studio was involved from the beginning, for example it has financed the making of the movie, all exploitation rights will be usually transferred to it. Alternatively, the producer may have concluded a Finance- Production- Distribution deal in which case he licenses his rights on an exclusive basis to the studio. In both cases, information and permissions for all of the necessary rights will be available from the studio.²⁸¹ Furthermore, major studios are international and so rights assignments are likely to be all encompassing. If the distributor is not a major studio, rights assignments are often territorial in nature. As a result, the national distributor may not be able to provide a Europe- wide license. Depending on the film, the rights may have been assigned to several distributors or still rest with the producer. In our example, the feature film *Mamma Mia* was produced by Judy Craymer, Gary Goetzman and Tom Hanks and distributed by Universal Studios which will in turn holds the rights.²⁸²

3.5.2.3.2 Producing a Work for TV

In general, the content of a broadcast follows the rules of any film or audio- visual material. A few comments are necessary. First, in cases where the broadcaster takes over the production, the rights in the script will be usually assigned to the broadcasting organisation and the content's copyright right in the audio- visual work will move from the individual producer to the corporation.²⁸³ If it is produced independently, then the producer remains the rights owner.²⁸⁴ The rights in underlying musical works and records will be licensed via the CMOs. It should be noted here that licensing agreements between an independent producer and a broadcaster may not include world- wide online rights. Broadcasters are territorial in nature and as a result, ITV for example, only licenses contents for domestic online use. Finally, independently of the underlying content, the rights in the broadcast as a transmission and therefore the neighbouring right will be held by the broadcasting company which is likely to license it directly.

²⁷⁹ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 26-242; Ver.di, *Tarifvertrag für auf Produktionsdauer beschäftigte Film- und Fernsehschaffende (TV FFS)*, art. 3.1.

²⁸⁰ It should be noted here that the major studios are based in the US and most films will be made under US law, not European one. In these cases, all copyrights will be most likely owned by the studio/ producer under work for hire agreements.

²⁸¹ R. Caves, *Creative Industries- Contracts between Art and Commerce*, pp. 103-120.

²⁸² The movie was co- produced by a number of other companies: Relativity Media (presented in association with); Littlestar (co-production); Playtone (co-production); Internationale Filmproduktion Richter (in association with). IMDb, *Mamma Mia- Company Credits* (http://www.imdb.com/title/tt0795421/companycredits?ref_=tt_dt_co, last accessed 3/9/15).

²⁸³ Writer's Guild GB, *BBC Agreement*, s.3.1; Writer's Guild GB, *ITV/ STV/ PMA Agreement* 6.1; ; BBC, *The BBC's General Terms for the Production of Television Programmes by Independent Producers* (http://downloads.bbc.co.uk/commissioning/site/BBC_General_Terms_2010.pdf, last accessed 11/9/15), s.12.2.1

²⁸⁴ *The BBC's General Terms for the Production of Television Programmes by Independent Producers*, s.18.3.1(i)

3.5.2.4 Conclusion

In summary, the protection of audio-visual works under copyright law is complex because it provides for two distinct sets of protection. First, there is the neighbouring rights protection for the fixation of a film work or moving images. These rights are by default owned by the producer. Secondly, films which cross the originality threshold of copyright works, defined as the author's own intellectual creation. In these cases, they gain protection as film works in addition to the fixation. Here, the copyright is always owned by the director. Other authors can be defined by the legislation or be included on the basis of their contribution. In practice, these two sets of rights however are not always implemented as such in the legislation. Civil law countries treat these two sets of protection as separate. Nonetheless, especially common law countries that do not distinguish between copyright and neighbouring rights protect the two as one. In these cases, the producer is added to the list of authors, as the example of the UK has shown.

In addition, the first ownership rules are more a bargaining chip in the contractual relations when a film is produced than an indication of ownership as such. It is common industry practice that the rights are transferred to the producer and in some cases even the distributor. These require the rights which form part of the film to commercially exploit it successfully. As a result, they will ensure that all contributors assign at least the relevant rights- usually by contract. In this sense, the default ownership rules give the authors something to sell and therefore be reimbursed for.

As a result of industry practice, it will be those (usually legal) persons that can exploit the work commercially which will hold the right. In the context of phonograms, this will be the record label. For audio-visual works, the producer or distributor will aggregate all of the relevant rights.

Phase 3		
Subject Matter of Protection	Audio-visual Work	
Default Ownership	Producer	Author
Practical Ownership	Producer or Distributor	

Graphic 11: Summary of the copyright and neighbouring rights provisions and industry practice in relation to films and film works.

3.6 Conclusion: Copyright and the Music Business

In summary, the music business is not limited to music. The range of affected subject matter includes both those works protected for their originality and those protected for their economic importance. In terms of original copyright works, the materials to be digitalised include musical works, literary works, dramatic works, dances, art works as well as audio-visual works. The neighbouring rights reflect the medium of the subject matter. The most relevant ones for European Sounds are phonograms (sound recordings) and broadcasts. The classification of a work into the right category is essential because it influences other aspects of its protection, such as the ownership of works and the term of protection.

Having said this, the lines between the categories are not fixed. First, the scope of any category of subject matter depends on the definition in national law. This has implications here, especially in relation to dances. While they are considered a dramatic work in the UK, they form their

own category of work in Germany. Secondly, how the subject matter needs to be classified also depends on the level of originality that applies. Here, the differences are pronounced. The UK relies on a low minimum originality threshold to distinguish between works that are within copyright and those that are not. It does not serve a function beyond this point. However, Germany relies on a generally higher originality threshold. While Germany also uses it to determine if a work is copyrightable in the first place, it also utilises it to distinguish between categories of subject matter. In particular, if a film is considered a film work or moving pictures depends on the level of originality reflected in it. Similarly, photographs are either classified as original art work or non- original photographs. The key aspect is that the original film works and photographs are protected as copyright works while the non- original ones are considered neighbouring rights.

Finally, depending on the national legislation, the subject matter definitions are to varying degrees open ended or exhaustive. German law relies on a set of open-ended definitions by providing examples of protected subject matter that falls within a certain category. The lists are not exhaustive and the categories are not mutually exclusive.²⁸⁵ The UK, on the other hand, operates a set of more narrow definitions and objects of protection can fall into more than one category. As Copinger and Skone James emphasise:

*'Unless the categories are expressly stated by the Act to be mutually exclusive, the only question is whether the subject matter in fact falls within the descriptions in question.'*²⁸⁶

Having said this, the only categories capable of overlap on the basis of their definitions and delineations are in practice dramatic works and film as well as literary works and artistic works.²⁸⁷ Furthermore, borderline case are to be classified according to the category that suits them most.²⁸⁸ In summary, an item has to be classified according to the national definition of subject matter, taking into account if overlap is possible.

In summary, first ownership of copy- and related rights only presents half of the copyright ownership story. The ownership of rights in a particular object of protection is significantly more concentrated in practice than the ownership provisions would lead one to believe. In order to exploit works commercially, authors and performers in particular often assign their rights to intermediaries. These include publishers, producers, movie studios and record labels, depending on the subject matter and industry in question. In addition to assignments, some subject matter is created in the course of employment and therefore at least partially owned by the employer- often one of the major intermediaries named above. Key exceptions to this are art works and works which are or contribute to works which were meant to be performed on stage.

²⁸⁵ H. Ahlberg and H.-P. Götting, *Urheberrecht* (München: C.H. Beck, 2015, 8th ed.), §2, para. 2

²⁸⁶ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright* (London: Sweet & Maxwell, 2013), para. 3-04.

²⁸⁷ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 3-05.

²⁸⁸ *Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] F.S.R. 401.

Copyright law in the context of the music business can be summarised like this:

Phase 1				
Subject Matter of Protection	Musical Work	Literary Work	Dramatic Work	Choreography
Default Ownership	Author	Author	Author	Author
Practical Ownership	Publisher		Author	Author
Phase 2				
Subject Matter of Protection	Performance		Recording Rights	
Default Ownership	Performer		Organiser	
Practical Ownership	Record Label		Record Label/ Organiser	
Phase 3				
Subject Matter of Protection	Phonogram		Audio- visual Work	
Default Ownership	Producer		Producer	Author
Practical Ownership	Record Label		Producer, Distributor or Label	
Phase 4				
Subject Matter of Protection	Literary Work	Art Work	Broadcast	
Default Ownership	Author	Author	Broadcaster	
Practical Ownership	Record Label	Author/ Record Label	Broadcaster	

Graphic 12: Summary of the copyright and neighbouring rights provisions and industry practice in the music business.

There are four interdependent phases, each one with its distinct set of actors which create works, either copyright or neighbouring rights one. By law, all of the rights described in the blue fields are considered copyright works and therefore subject to the Creator Doctrine. The rights will therefore be held by the author(s) of the respective works. The orange fields represent neighbouring rights. Here the rights owners are dependent on the type of subject matter. The performance rights are owned by the performer or artist; the rights in the phonogram belong to its producer; the first fixation of a film is also granted to its producer and finally the rights in the broadcast or held by the broadcaster.

However, in practice the rights are aggregated into the hands of a few intermediaries. There are three major intermediaries which hold the rights in musical works and its various forms of distribution. The publisher owns the rights in the underlying copyright works, especially the lyrics and the musical composition. The record label holds all of the rights relevant to the record: the performance, the phonogram's producer's rights as well as those rights related to the booklet.²⁸⁹ It

²⁸⁹ The ownership of the art work strongly depends on the contractual relationship. Nonetheless, the label would at least license the work to the extent required for the purpose of the license.

may also own the rights in related audio-visual works, especially if it has financed its product. Finally, if the song is broadcast, the broadcaster holds the rights in the broadcast itself.

A significant proportion of the archival material held by Europeana institutions is non-commercial in nature. This means that it was never meant to be exploited on a large scale, for example research information or some oral histories. This also covers works which have not yet been published, such as personal archives. In these cases, the copyright is unlikely to have been assigned to a third person or an intermediary. In other words, the most likely rights owner in these instances are the rights owners defined by law or their heirs.

4. Licensing Works

The previous section has detailed what kind of copyright works and neighbouring rights are relevant for Europeana Sounds. This discussion should enable a CHI to determine which parts of its archival holdings are copyright relevant and which are not. It also provided an idea of who is the most likely rights holder and therefore the person who can give permission to CHIs to use an object of protection. However, this now raises the question what kind of permissions do CHIs actually require? In other words, for what uses do they need to get licenses.

In the introduction of the report, the three major exclusive rights from which copyright works and subject matter protected by neighbouring rights benefit were outlined.²⁹⁰ The first right is the reproduction right which covers the copying of an object of protection in whole or in part. The second one is the distribution right which regulates the sale of physical copies of the subject matter. Finally, there is the communication to the public right. Its focus is on uses which rely on the intangible form of the subject matter, for example playing it in public (performance), broadcasting or making works available online. In this context, it is now necessary to clarify how these diverse exclusive rights apply to Europeana Sounds. The aim is to establish what kind of licenses the participating CHI require in practice.

4.1 Licensing Requirements: Europeana in the Context of Copyright Law

4.1.1 In-Copyright Subject Material

If material is still in copyright, Europeana Sounds is strongly affected by current copyright regulation. In order to make analogue materials available online, they first have to be digitized and then uploaded to a server. These activities are relevant in terms of copyright law in two distinct ways. When protected subject matter is digitised, it is essentially copied in its entirety. This reproduction of protected material is restricted by the reproduction right. Under EU law, this right includes both permanent and temporary reproductions.²⁹¹ Secondly, the object of protection is uploaded to a server to give the public access to it. This falls under the 'making available to the public' right. This particular activity is a specifically mentioned instance of communication to the public, a right which covers any transmission of a protected material in such a way that the public is not present at the location of the transmission.²⁹² It is defined as

'...making available their works in such a way that members of the public may access them from a place and at a time individually chosen by them'.²⁹³

In summary, the licenses have to cover reproduction as well as making protected material available online.

At this point, it should be clarified that there are not any relevant exceptions in the Information Society Directive that European CHIs could benefit from to digitise protected subject matter and make it available online without the permission of the right owner. There are three exceptions commonly referenced in this context. First, specific reproductions are permitted for non-

²⁹⁰ See section 2.2 Exclusive Rights.

²⁹¹ InfoSoc Directive, art. 2.

²⁹² C. Geiger and F. Schön herr, 'The Information Society Directive', pp. 408- 409.

²⁹³ InfoSoc Directive, art. 3(1).

commercial purposes and by certain types of institutions.²⁹⁴ While data providers are likely to meet the institutional requirements, only 'specific reproductions' are covered. This does not include mass digitization projects as carried out here, as recent case law has explicitly clarified.²⁹⁵ Secondly, another exception refers to making objects of protection available in digital form.²⁹⁶ However, again this exception does not apply because it requires dedicated terminals on the grounds of the institution from which these materials are accessible.²⁹⁷ It essentially refers to intranet, not internet access. Given the EU-wide access that Europeana provides, the scope of this exception is too narrow.

Finally, EU law provides for a quotation exception, covering extracts of protected subject matter.²⁹⁸ This is often argued as applying to snippets. However, this exception only permits quotations for specific purposes, such as criticism or review, to the extent required by this specific purpose.²⁹⁹ This means in practice that the quotation has to form part of another work. The quotation has to be illustrating or proving a proposition in relation to the quoted material and by doing so, provide an added benefit to a distinct work.³⁰⁰ As snippets do not form part of an independent work, the quotation exception is therefore not applicable. In summary, if a material is in copyright, licenses from the right holders are essential.

It is the institutions carrying out the digitising and making available that require licenses. In its current form, Europeana itself does not require them. Europeana is a non-commercial cultural project, essentially a gateway to resources held by its member institutions. It aggregates the meta-data provided by contributing institutions, making the collections searchable from one central point. It does not store digital objects on its own servers.³⁰¹ Although it provides links to the material, it was held in *Svensson* that hyperlinking is not a communication to the public and therefore also does not require a license. In essence, the copyright relevant act is making the material available on the internet to the public for the first time. Hyperlinking is not changing this, unless the scope of people who can access the object of protection expands significantly. This would, for example, be the case when a work which is behind a paywall on the original homepage is made available without these restrictions on a secondary one via a link.³⁰² However, this is not the case of Europeana and therefore hyperlinking is not licensing relevant.

²⁹⁴ InfoSoc Directive, art. 5(2)(c)

²⁹⁵ It was held that digitisation of works held by a library is permissible if it is necessary to make the works available at dedicated terminals. This is not the case for Europeana and so the reproductions cannot be justified this way. *Technische Universität Darmstadt v Eugen Ulmer KG GRUR 1078- Elektronische Leseplätze*, at 1080 (especially note 45) and 1081; L. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of Limitations on Copyright under Directive 2001/29/EC', *JIPITEC*, 2010, Vol. 1, No. 2, p. 60.

²⁹⁶ InfoSoc Directive, art. 5(3)(n).

²⁹⁷ *Technische Universität Darmstadt v Eugen Ulmer KG GRUR 1078- Elektronische Leseplätze*, at 1081; L. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of Limitations on Copyright under Directive 2001/29/EC', p. 60.

²⁹⁸ InfoSoc Directive, art. 5(3)(d).

²⁹⁹ InfoSoc Directive, art. 5(3)(d).

³⁰⁰ M. Walter and S. Von Lewinski, 'Information Society Directive' in M. Walter and S. Von Lewinski, (eds.), *European Copyright Law- A Commentary* (Oxford: Oxford University Press, 2010), p. 1050.

³⁰¹ EU, *EUROPEANA – Europe's Digital Library: Frequently Asked Questions* (http://europa.eu/rapid/press-release_MEMO-08-724_en.htm?locale=en, last accessed 31/8/15).

³⁰² The court labelled this expanded accessibility as a 'new public'. *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* (Case C-466/12) [2014] OJ C 93/12; C. Geiger and F. Schönherr, 'The Information Society Directive', pp. 414-415. It should be noted though that snippets directly stored by Europeana could require a license under EU Law.

In summary, it is clear that CHIs participating in Europeana Sounds will require licenses³⁰³ from all relevant the right holders to carry out their activities legally if material is still in copyright. It has to cover both the digitisation and therefore the reproduction of the subject matter as well providing online access to it, in other words, making it available online.

4.1.2 Identifying Subject Matter in the Public Domain

Subject matter in the public domain can be made available more easily. In particular, CHIs only require permission from the author to reproduce and make materials available online if a work is still in copyright. However, care has to be taken when the copyright status of the material is assessed. If the assessment is incorrect and no license is sought when it should have been, the CHI may be exposed to infringement claims. As a result, it is essential that the term is calculated correctly. The term of copyright protection is defined in the law and varies depending on the type and age of the subject matter in question.³⁰⁴ Given the complex nature of the rules, one tool to facilitate the correct calculation are the calculators and flowcharts provided by outofcopyright.eu.³⁰⁵ In practice, identifying the status of materials as in or out of copyright is costly. For example, the term of protection for copyright works is calculated according to when the (last surviving) author has died.³⁰⁶ This means all relevant authors have to be first identified which can be, as the following sections discuss in more detail, very challenging in practice.

In addition, while reproductions and making the material available online are not relevant concerns for public domain works, other issues do remain. On one hand, moral rights can last longer than the statutory copyright term.³⁰⁷ On the other hand, the actual content of a work can be relevant in ethical terms. If recordings for example focus on a specific event or culture and were not made with distribution in mind (for example for research purposes), making them available on a large scale can affect participants and/ or the community at large. Care needs to be taken to ensure that both of areas are cleared before public domain materials are made available online.³⁰⁸

4.2 The Licensing System

As the previous discussion has demonstrated, CHIs require licenses to legally use protected subject matter that are under copyright to protection. In fact, millions of users all across the world are in a similar situation every day. As a result, licensing has become common practice over the last century to facilitate the licensing process. In general, licensing requires three distinct types of actions: a) identify and locate the owner of rights; b) negotiating a price and c) monitoring and

³⁰³ A license here refers to any kind of permission by the right holder. This can involve payment but does not necessarily have to.

³⁰⁴ For a detailed report on calculating the term of protection and remaining national variation, see for example C. Angelopoulos and C. Jasserand, 'Public Domain Calculator- Report and Documentation'.

³⁰⁵ Out of Copyright, *Public Domain Calculators* (<http://outofcopyright.eu/>, last accessed 31/8/15)

³⁰⁶ Some copyright works, for example film works, are calculated differently.

³⁰⁷ A discussion of moral rights is beyond the scope of this report. The issue has been discussed in the context of CHIs by J. Canat, L. Guibault and E. Logeais, 'Study on Copyright Limitations and Exceptions for Museums', *WIPO Standing Committee on Copyright and Related Rights: Geneva June 29-3 2015*; and M. Salokannel, A. Strowel and E. Derclaye, 'Final Report on Study contract concerning moral rights in the context of the exploitation of works through digital technology (ETD/99/B5-3000/E/28)'.

³⁰⁸ For a more detailed discussion, see section 4.3.5 Permission Issues in Addition to Copyright.

enforcement. Each one of them imposes a cost on either the licensor or the licensee.³⁰⁹ As a result, this process can be very onerous for both the users and the right holder. The user has to invest his resources into locating the rights owner and negotiating his license. The right holder also has the negotiation cost, in addition to the cost imposed the monitoring and enforcement requirements.

While these costs may be manageable if only a few transactions are involved, they pose a real issue when the number of required licenses multiplies. For example, a radio broadcaster wants to play music in his programs. Theoretically, he would have to identify the right holders for each song he plays, wherever they are, and then negotiate a license with them. Given the international nature of the music business, this would entail world- wide searches and negotiations in several languages, without any assurances of success. For the rights holders, it would entail constant requests for licenses, leaving them little time to do his real work: creating new works. In this scenario, it is easy to see how the licensing effort would most likely outweigh its benefits for both sides.

The problem of having to provide licenses to a large number of users is not new and has been traditionally solved by Collective Management Organisations (CMOs). In practice, individual contracting is prevalent in the primary market while the secondary market is often subject to collective management.³¹⁰ This means that exclusive rights are subject to direct contractual relations between the creator and the intermediary, as described previously in the in the part on common industry practices. At the same time, the numerous secondary non- exclusive uses, such as performing protected materials in public, is often administered by CMOs. In essence, they are collecting the royalties for high volume but low value non- exclusive uses, such as performing a work or online exploitation.³¹¹ They are in practice the major licensing intermediary between the right holder and the user.

4.2.1 CMOs and the Collective Management System

This section will outline the current CMO- based licensing system in general. The main aim is to provide an overview of how it works and therefore lay the foundation for a more detailed discussion later on, including the issues that the current system faces in the digital environment.

In general terms, CMOs manage the rights of their members and permit their use by the licensee based on a set of defined tariffs in return for payment. The role of CMOs in the licensing process can be best understood as a way of outsourcing the licensing process to a third party. CMOs work on the basis of assignment of rights: when a right holder joins a CMO, he has to assign his rights to the CMO.³¹² On this basis then, the CMO provides the users with the licenses they require. They furthermore ensure the monitoring and enforcement of the licenses, relieving the right holder of this duty. In other words, they ensure that users pay according to the rules.

³⁰⁹ M. Kretschmer, 'Access and Reward in the Information Society: Regulating the Collective Management of Copyright' [Working Paper], 2005 (eprints.bournemouth.ac.uk/3695/1/CollSoc07.pdf, last accessed 31/8/15), p. 6.

³¹⁰ R. Hilty and S. Nérison, 'Collective Copyright Management' in R. Towse and C. Handke (eds.), *Handbook on the Digital Economy* (Cheltenham: Edward Elgar, 2013), p. 223.

³¹¹ S. Haunss, 'The Changing Role of Collecting Societies in the Internet', *Internet Policy Review*, 2013, Vol. 3, No. 3, p.1

³¹² The transfer can be exclusive or non-exclusive, depending on the legal context. It is usually exclusive though.

CMOs exist for most areas of copyright and neighbouring rights. Collective management by CMOs is so established because it (theoretically) creates significant economic efficiencies: they lower transaction costs and provide economies of scale in the administration of rights. The licenses they provide are identical in their key characteristics. This means that a large number of them can be managed at a low marginal cost, in other words: each additional license does not cause significant extra burdens. In addition, their predictable structure reduces the negotiation costs.³¹³ Furthermore, determining use requires information but this information is largely the same for all users. As a result, a large number of users can be dealt with in the same administrative way. This again reduces the cost per transaction. In addition, once a database of protected material has been established, adding more items to it can be done at very low cost.³¹⁴ Therefore, the more items a CMO represents, the lower the administration cost per work. Finally, by sharing the cost of administering the rights among all of its members, the cost for each one is lower on average than it would otherwise have been.³¹⁵

The user therefore has one common point of contact to acquire the necessary licenses and as a result the need to search for the right holder is significantly reduced. The negotiating costs are also smaller because a set framework of tariffs exists, giving certainty to the user. The right holder benefits from not having to handle all of these negotiations himself while still getting remunerated for the use of his materials. As a result, both sides are better off compared to individual licensing.

CMOs traditionally provide the user with blanket licenses covering the world-wide repertoire in one particular territory. Copyright works, especially music, are traded and used in more than their country of origin, making their exploitation very international in nature. The song *Mamma Mia*, for example, was not only successful in Sweden, its country of origin, but also all across the West. As a result of this dynamic, CMOs have reciprocal agreements with other CMOs representing the same type of right holders in other countries. These agreements permit them to license the repertoire of other CMOs in addition to their own to users within their territory. In other words: CMOs can provide a multi-repertoire, single-territory blanket license. For example, a German CMO will be able to license a Swedish song to a German user. Therefore, when a German user goes to his local CMO in charge, he will be able to acquire the licenses for all the works he needs. It should be noted here that if a true blanket license is available, it is not necessary to assess the copyright status of individual works separately as whatever needs to be covered, will be. Given the complex rules on assessing the term of protection for a specific work, this can be a major benefit to the user.

However, it is not one CMO which handles the rights for all protected subject matter but depending on the type of material and the industry sector in question, different CMOs manage the relevant rights.³¹⁶ Furthermore, their division of labour is not a reflection of copyright uses. Instead, it follows the logic of copyright law, distinguishing between subject matter and individual right holders. For example, let's go back to our sound recording of ABBA's song *Mamma Mia*. As we have discussed before, there are four types of subject matter which it entails (see Graphic 13 below): the musical

³¹³ Tariffs are essentially information available to all participants. The more information participants have, the lower the transaction costs involved.

³¹⁴ C. Handke and R. Towse, *'Economics of Copyright Collecting Societies'* [working paper], 2007 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085, last accessed 31/8/15), p. 3.

³¹⁵ C. Handke and R. Towse, *'Economics of Copyright Collecting Societies'* [working paper], p. 3.

³¹⁶ See annex for an indication for an indication of relevant CMOs and which type of right holder they represent.

work (melody), the literary work (lyrics), the performance by ABBA and the phonogram (fixation of the performance).

Phase 1		
Subject Matter of Protection	Musical Work	Literary Work
Default Ownership	Author	Author
Practical Ownership	Publisher	
Phase 2		
Subject Matter of Protection	Performance	
Default Ownership	Performer	
Practical Ownership	Record Label	
Phase 3		
Subject Matter of Protection	Phonogram	
Default Ownership	Producer	
Practical Ownership	Record Label	

Graphic 13: Extract of Work Type and Ownership (Graphic 12)

A CMO managing the rights in a song tends to represent composers, lyricists as well as publishers. As the previous discussion has shown, this covers the three main stakeholders of a song.³¹⁷ However, the neighbouring rights in the phonogram and the performance are commonly managed by another CMO. This is little surprising from an industry viewpoint: the rights in the performance and phonogram belong to another set of right holders, in particular the performer and especially the record label. It is therefore not surprising that they are managed by one CMO but a different one than the rights in the song. Overall, this division between the rights in the song and the performance/ phonogram means that more than one CMO may have to provide a license for the exploitation of an item. For example, to play a sound recording in public in the UK, a license from PRS (the CMO for performance rights in songs) for the song as well as one from PPL (the performing rights CMO for phonograms and performers) to cover the performance and phonogram is required.

CMOs exist for almost all sectors of copyright protection. Like with musical works, phonograms and performances, CMOs also commonly exist for literary works, art works, audiovisual works and others. Who each one represents and what type of licenses they offer however varies between CMOs and across countries. This complexity makes the process difficult to manoeuvre, although the individual licensing efforts may be efficient.³¹⁸ It should also be noted that there may be more than one CMO per subject matter type or right holder category. If there is not a legal

³¹⁷ See section 3.1 Stage 1: The Underlying Work.

³¹⁸ D. Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', in D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (Aalpen aan de Rijn: Wolters Kluwer, 2010, 2nd ed.), p. 13.

monopoly, smaller CMOs can become relevant. For example, GEMA is the main CMO handling the rights in songs. However, the German C3S is newly- established and small but actively advertises itself to right holders as the GEMA- Alternative. There are also specific sectors for which more than one collecting society already plays a role, for example with neighbouring rights in some member states such as France and Spain (for performers).³¹⁹

In practice, this CMO-based licensing system is in place and works largely efficiently from a user perspective for analogue uses. Analogue uses are characterised by their single-territory nature. For example, there is no need for a British pub owner to get a license which covers other countries because his audience is in Britain. Getting a wider scope license would only increase his licensing cost. However, Europeana is different in a number of key areas compared to the more traditional users. All of these differences create major licensing issues in practice. They will now be discussed in turn.

4.2.2 Issues with CMO clearance

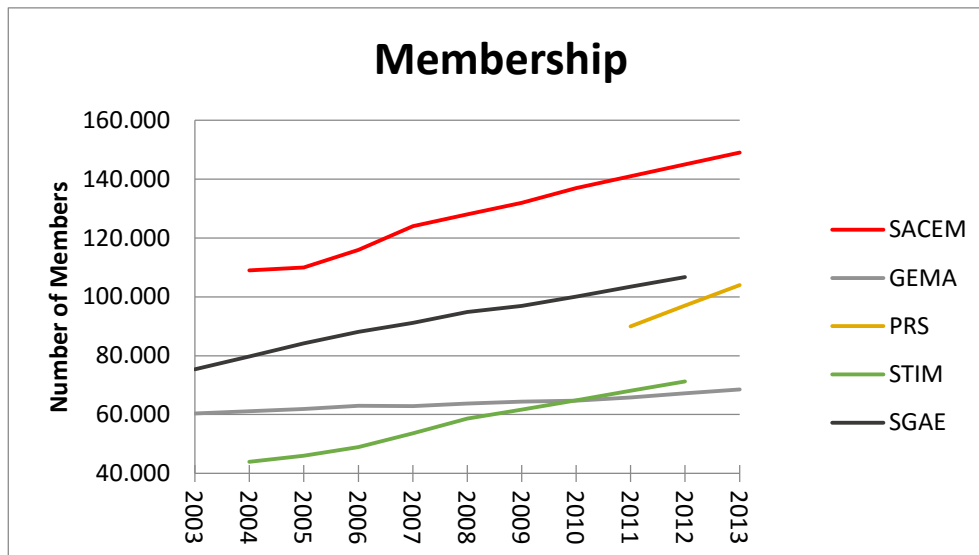
The European Commission has recently identified the lack of cross- border digital services as one of the main obstacles to the European Single Market.³²⁰ In particular, many services relying on copyright content are only available in their country of origin but not in other member states, even when customers have paid for access. This geo-blocking of access is a barrier in the common market and makes digital services less attractive. A number of the issues related to geo-blocking can be traced back to systemic weaknesses in the CMO system. These relate to the coverage of subject matter, rights fragmentation and the availability of multi-territorial licenses (MTL). These will now be discussed in turn.

4.2.2.1 Membership Representativeness

The first problem in the context of CMOs is the lack of coverage by CMOs in terms of membership. Not every right holder is necessarily a member of a CMO. This phenomenon can be illustrated using musical works. In music, the role of CMOs in administering rights is well established. As a result, it could be expected that their CMOs have the broadest coverage in terms of membership of any sector. However, looking at the membership numbers for key European CMOs shows that this assumption is troublesome. Most notably, the overall size of the membership is not reflecting the size of the population as could have been expected.

³¹⁹ J. Axhamn and L. Guibault, *'Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage? Final report prepared for EuropeanaConnect'* (<http://www.ivir.nl/publicaties/download/292>, last accessed 10/9/15), p. 31; Competing CMOs are even recognised in ECL schemes, especially in Norway and Finland.

³²⁰ EU, *Digital Single Market- Brining Down Barriers to Unlock Online Opportunities* (<http://ec.europa.eu/priorities/digital-single-market/>, last accessed 21/9/15)



Graphic 14: Membership numbers of major European CMOs.³²¹

As is clear from the graph, the most populous member state Germany's GEMA has fewer members than STIM, originating in the significantly smaller and less populous Sweden. It is therefore not valid to assume that all CMOs are equally representative for a specific category of right holders.

There are a number of explanations for the lack of coverage. Existing CMOs have faced criticism from their members on a number of issues, ranging from the cost of administration to online exploitation. As a result, there are rights holders who have consciously left or not joined the major CMO in their national territory. It is also important to note that self-published and self-produced music, a growing trend in the music business facilitated by digital technology, is only covered if the musician has actively decided to join a CMO.³²²

Overall, it should therefore be kept in mind at all times, that even a cooperation with all of the major CMOs is likely to keep parts of the national repertoires uncovered.³²³ The problem is likely to be more acute in relation to the materials held European institutions. The range of materials which are to be digitised is very broad. Collections include recordings which were never intended for commercial use, such as recordings of folk music where the recording has been done by the institution itself. Based on the lack of commercial motive, right holders in these particular works and recordings are unlikely to have them registered for management by a CMO.³²⁴

At the same time, the effect of this lack of coverage crucially depends on the national regulation. In particular, there are a number of mechanisms which can make the coverage of CMOs more comprehensive than their membership. The first one is compulsory membership. Here, the administration of rights has to be assigned to a CMO, usually one with a national monopoly. As a result, a CMO has a truly national repertoire. The second option is a presumption of collective management. Here, all works are presumed to be managed by a CMO unless the right holder has

³²¹ J. Street and S. Schroff, CREATE working package 'Regulating the European Collective Management Organisations' [unpublished].

³²² The online advice for self-publication explicitly recommends joining a CMO.

³²³ There are no statistics available on the size of the problem.

³²⁴ T. Woods, 'Multi-territorial Licensing and the Evolving Role of Collective Management Organisation' in D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (Aalpen aan de Rijn: Wolters Kluwer, 2010, 2nd ed.), p. 114.

consciously and actively withdrawn them.³²⁵ As a result, the coverage is not truly all encompassing but still larger than the membership numbers would suggest. Finally, even in the absence of legal requirements for rights management, CMOs may be able to offer so-called Extended Collective Licensing (ECL) schemes.³²⁶ The CMO will license the use of all works, even those which were created by authors who are not members. If a non-member comes forward later to demand remuneration, he will negotiate with the CMO and get paid by it. The user is legally covered from infringement. In summary, compulsory membership, presumptions of management and ECL schemes can cushion the effect of lacking membership coverage. However, if none of these are in place, the lack of coverage becomes an acute issue. This concern is likely to be more pronounced for other types of protected subject matter where collective management is less prevalent as well as in the context of non-commercial works.

In summary, CMOs have a large repertoire but it is biased towards commercial subject matter. Non-commercial ones, and therefore a large proportion of archival materials to be digitised, are significantly less likely to be covered. This gap will have a significant impact in the viability of rights clearance via CMOs, especially in the absence of regulatory measures to cushion this, such as mandatory or presumed CMO management and/ or ECL schemes.

4.2.2.2 *Rights Fragmentation*

Even if a CMO has a particular item in its repertoire, it is not automatically clear that it can also license it for online use. The landscape for licensing the making available right in particular differs from the one for analogue uses. This issue has two sides. On one hand, significant portions of the archival materials to be digitised are comparatively old. This makes not only the expiry of copyright a key issue, but also determining ownership. Rights are more likely to have been transferred as time goes on, for example by testamentary disposition. Tracing the chain of ownership can be a challenge, especially in the absence of industry aggregation. Furthermore, determining the ownership of specific rights has also been complicated by the 2011 amendment to the Term Directive. Performers are since then able to re-claim their rights if records are not being marketed for the extended period of protection.³²⁷

On one other hand, there is the problem of rights fragmentation. Under EU law, copyright owners are free to assign their rights to any EU CMO they chose. They can also divide them between different CMOs or manage all or parts of them themselves. As a result, the administration of rights has become increasingly fragmented as publishers and record labels in particular have chosen to administer their rights separately.³²⁸ For example, publishers such as Sony have withdrawn key parts of their repertoire, especially the Anglo- Saxon one, and bundled them instead in so- called HUBs.³²⁹ However, they have not withdrawn the protected subject matter as a whole but instead only the

³²⁵ See for example in the German case §13c(1) 1965 Urheberrechtswahrnehmungsgesetz (WahrnG).

³²⁶ For a detailed discussion of ECL systems, including their design, strengths and weaknesses in the EU context, please see J. Axhamn and L. Guibault, '*Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage? Final report prepared for EuropeanaConnect*'.

³²⁷ It is unclear however how significant this issue is, especially in relation to individual right holders.

³²⁸ CMO Directive, Part III.

³²⁹ HUBs are separate legal entities for licensing which are managed directly to one or more CMO. These CMOs are then able to license this repertoire in addition to their own repertoire. However, the CMO which had originally held these works will not be able to issue a license anymore.

online rights. This means in practice that while a CMO may be able to license the broadcasting of works on the radio, it may not be able to license their streaming online.

Overall, the issues of rights assignment, reversion of rights and assignment over time means that when licensing a subject matter via CMOs, particular care has to be taken that the licenses actually cover all of the current right holders for the specific rights required. It has been pointed out that this task should not be underestimated. In particular, some CMOs struggle to identify the specific items and rights relating to them that they administer.³³⁰

4.2.2.3 Territorial Scope of Rights

While the coverage of items and rights fragmentation undoubtedly pose an issue in practice, the major problem relates to MTLs CHIs require to contribute to Europeana as part of Europeana Sounds. The current system is made for more traditional uses in which users require licenses that only cover their national territories. For example, the owner of a club would favour a blanket license so that he can play any song in his club. This is a multi- repertoire license for a single territory. However, CHIs require multi-repertoire, multi- national licenses. Europeana only accepts materials which are available at least Europe-wide. Institutions therefore need to acquire MTLs for online use, a major challenge in practice.

As was discussed before, CMOs are able to provide multi- repertoire blanket licenses on the basis of reciprocal agreements.³³¹ Having said this, under this traditional system, licenses for musical works managed by sister CMOs only cover the specific national territory in question. This means that while a collecting society may be able to issue multi- territorial licenses for its own repertoire, it can by default only issue national licenses for those works which it manages for other collecting societies. It may therefore be necessary to contact the original collecting society holding the rights or the one handling the online rights under a MTL mandate for the original CMO in question. This approach however would entail prohibitively large negotiating costs due to the high number of transactions involved as well as other barriers such as language differences. As a result, it is currently not possible to license a world-wide repertoire with the local collecting society on a MTL basis.³³² Furthermore, licensing the same works from different right holders across borders poses a challenge in terms of coverage. The terms and definitions used in copyright acts and licenses³³³ as well as the applicable conditions vary significantly across member states. As a result, licenses may potentially be

³³⁰ H. Ranaivoson, M. Iglesias and A. Vondracek, 'The Costs of Licensing For Online Music Services: an Exploratory Analysis for European States', *Michigan State International Law Review*, 2013, Vol. 21 Issue 3, p.674.

³³¹ See section 4.2.1 CMOs and the Collective Management System.

³³² This problem has been the reason why online music services so far have been aimed at a particular territory only rather than one store for all territories (see Spotify, YouTube, etc)- with all the accompanying variation that has resulted from it. It also poses a transparency issue as it is not always clear to the consumer why access varies to services across border within the SEM. One well- publicised example of this has been the disagreements between GEMA and YouTube, causing thousands of streams becoming unavailable in Germany. Users at the same were consciously aware that these streams were accessible in other parts of the EU, and in combination with emotive YouTube statement, caused significant frustration in Germany. Having said this, the Directive does establish the so-called passport system which enables one CMO to mandate another CMO to manage its online rights under certain conditions. However, to what extent this actually improved the licensing situation remains to be seen. CMO Directive, art. 29-31.

³³³ See for example the meaning of joint work in Germany, the UK and at EU level in Part I, especially section 3.1.4 Ownership.

incompatible with each other.³³⁴ Identifying these differences requires extensive legal expertise and specialist knowledge of national copyright provisions. It is questionable if users can actually be expected to anticipate and resolve territorial clearance challenges, especially if they are not professional users.³³⁵ In summary, it will therefore be very complex for the user to ensure that he has cleared the correct rights in all member states under the current CMO system.

The problem has been recognised though.³³⁶ In recent years, some CMOs have started to provide multi-territorial licenses. There are two distinct ways this has been implemented. On one hand, there are CMOs, especially in the non-musical sectors, which are providing tariffs for online exploitation such as streaming. If they are able to provide MTL, these will most-likely be based on the reciprocal agreements between CMOs. For example, multi-territorial and multi-repertoire licenses are available for broadcasting.

Having said this, the availability of tariffs is limited in practice. Taking a look at the CMO landscape across all relevant copyright works and neighbouring rights as European CHI face it in Germany and the UK reveals the extent of the gaps. As the following discussion shows, many CMOs do not relevant online tariffs even for the subject matter they hold the rights for or the scope of the tariff is narrow in terms of territories covered. In fact, only artistic works can be fully licensed for online use via CMOs. In the UK, the rights of visual artists are managed by the Design and Artists Copyright Society (DACS). It includes painters, illustrators, designers, photographers, sculptors, craftsmen and animators.³³⁷ According to its tariff structure, it seems likely that it can authorise the making available online.³³⁸ In Germany, VG Bild- Kunst will be able to provide licensing under its tariff structure. Its membership covers authors/ makers of works falling within the category of art work and photographer (both original and non-original).³³⁹

Music works are managed by GEMA in Germany and PRS in the UK. Both of these have tariffs covering the online exploitation of musical works. However, the rights in phonograms and broadcasts are collectively managed by GVL in Germany. Although GVL's tariffs include online radio, it does not provide for the interactive online use³⁴⁰ of the kind institutions require in the context of European Sounds require. Therefore, licensing phonograms and broadcasts requires direct negotiations with the right holder. Similarly, PPL, in charge of licenses for recorded media in the UK, does not offer an online streaming tariff on its homepage. It therefore seems unlikely that it is able to license this kind of use.³⁴¹ VPL (UK) which administers the rights in music videos does also not have a streaming

³³⁴ T. Woods, 'Multi-territorial Licensing and the Evolving Role of Collective Management Organisation', p. 109.

³³⁵ T. Woods, 'Multi-territorial Licensing and the Evolving Role of Collective Management Organisation', p. 107.

³³⁶ CMOs themselves had designed a solution which would have offered multi-territory and multi-repertoire licensing in form of the Santiago agreement. It was not renewed in 2004 due to competition concerns by the Commission, in particular its allocation of customers clause.

³³⁷ It should be noted here that artists are free to license directly.

³³⁸ DACS, *Other Digital Uses* (<http://www.dacs.org.uk/licensing-works/price-lists/digital-publications-and-apps/other-digital-uses.aspx>, last accessed 14/9/15).

³³⁹ It should be noted here that although VG Bild- Kunst's membership includes rights holders in films, it does provide relevant tariffs in this area.

³⁴⁰ Interactive use refers to the ability of the user to choose the material he watches and their order. This has to be seen in contrast to non-interactive uses, such as broadcasting, where the program is fixed.

³⁴¹ PPL, *All PPL and VPL Tariffs* (<http://www.ppluk.com/I-Play-Music/Businesses/How-much-does-a-licence-cost/Business-type-116/>, last accessed 10/9/15).

tariff.³⁴² Licensing a music video would therefore also require direct contact with the right holder, most likely the record label.

It is especially the availability of online tariffs which is limited in the context of other works. For example, while VG Wort administers the rights in literary works, it only offers licenses for online use by universities and schools but not for other parties.³⁴³ In the UK, there is no CMO in charge of literary works which would cover the digitisation in the way Europeana carries it out. While the Copyright Licensing Agency issues licenses for the digitisation itself, it only covers intranet storage and therefore not making the work available online.³⁴⁴

Finally, there is also no relevant CMOs for the making available right of films in Germany or the UK. In Germany, neither the VFF nor the GWFF (the two major CMOs in charge) is able to provide the type of licenses required by Europeana Sounds.³⁴⁵ In the UK, rights of directors of what are called post-term works and therefore those where other licensing agreements have expired, can be assigned to Directors UK.³⁴⁶ However, the assignment only covers the UK and therefore it is not able to provide MTL. Furthermore, it does not cover producers,³⁴⁷ leaving the main right holder uncovered.

One explanation for the lack of available licenses may be found in the uncertainty around legal status of the reciprocal agreements. The key feature in reciprocal agreements is traditionally a national allocation clause. It means that users are not free to choose which CMO they get their license from, despite all of them being theoretically able to provide one. Instead, they have to go to their national provider. This entails obvious issues in terms of the European Single Market and cross-border trade as the market remains artificially segmented, undercutting all possible competition between CMOs. As a result, this approach has been found declared anti-competitive by the European Commission³⁴⁸ before and continues to be actively challenged by it, most strongly in the music sector.³⁴⁹

³⁴² PPL, *All PPL and VPL Tariffs* (<http://www.ppluk.com/I-Play-Music/Businesses/How-much-does-a-licence-cost/Business-type-116/>, last accessed 10/9/15).

³⁴³ However, they have now started collections for literary works made available online but publisher participation remains limited, requiring authors to register themselves. (VG Wort, *Texte im Internet* (<http://www.vgwort.de/verguetungen/auszahlungen/texte-im-internet.html>, last accessed 10/9/15)).

³⁴⁴ CLA, *Public Administration License* (http://www.cla.co.uk/licences_available/public_administration/, last accessed 10/9/15).

³⁴⁵ The German VFF is not providing online tariffs as required by Europeana Sounds according to its homepage. (VFF, *Wahrnehmungsvertrag* (http://www.vff.org/static/images/fckfiles/file/Wahrnehmungsvertrag%20Filmhersteller/Wahrnehmungsvertrag%2019-11-2014_clean.pdf, last accessed 10/9/15); and neither does GWFF (GWFF, *Wahrnehmungsvertrag* (<http://www.gwff.de/pdf/wahrnehmungsvertrag.pdf>, last accessed 10/9/15)).

³⁴⁶ Directors UK, *Collection Agreement* (http://www.directors.uk.com/sites/default/files/node_attachments/DUK%20Collection%20Agreement%20Final.doc, last accessed 15/7/15), art. 2.

³⁴⁷ In the UK, the producer and director are co- authors and therefore clearance from both is required.

³⁴⁸ The practice on the allocation of membership and exclusivity were found to be anti- competitive because they cause a segmentation of the market. *CISAC decision* [2008] OJ C 323/12, at note 2.

³⁴⁹ CMO Directive, Part III; European Commission Recommendation of 18 May 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC).

As a consequence of this, there are now CMOs which can offer true multi- territorial licenses. This is strongly encouraged by the EU in general but now explicitly required in the case of music.³⁵⁰ These differ from the licenses based on reciprocal agreements: the membership here includes artists from different territories. In other words, rather than only representing German artists and being to provide multi- territorial licenses for these, the membership and therefore repertoire itself is international. However, the license coverage is not a true blanket license: there are important sections of even the commercial repertoire missing.

A look at how the system looks in practice clarifies this. Today, those CMOs that are able to offer truly multi- territorial licenses are managing HUBs. HUBs refer to the separate legal entities founded by a (large-scale) right holder for the purpose of licensing. Most of them cooperate very closely or are even managed by one or more CMOs. These CMOs are as a result able to license this repertoire in addition to their own repertoire. However, the CMO which had originally held these items will not be able to issue a license anymore. Major publishers have bundled their rights in these HUBs but the repertoire is not universal. Instead, repertoire coverage is divided along the lines of publishers or even certain sections of a publisher's repertoire, for example Latin- American music. The management of HUBs overlaps to the extent that specific CMOs are able to license rights related to more than one repertoire. For example, PRS for Music in the UK is involved in '*Peer Music Publishing Anglo-American repertoire, Imagem Anglo-American repertoire, IMPEL Anglo-American repertoire, CELAS and SOLAR351 (EMI and Sony/ ATV Anglo- American repertoire) and Warner Chappell Music Publishing repertoire as a PEDL partner*'.³⁵² However, depending on what type of repertoire the user requires, it is likely that he will have to contact more than one CMO to cover all the required rights. The multi- repertoire nature has in this context been sacrificed for the multi- territorial coverage. The licenses do not combine both.

In addition, these Hubs only cover musical works. All other types of subject matter for which licenses are required cannot be cleared this way. Record labels which own the rights in the performance and phonogram usually manage their rights individually, but on a multi-territorial basis. The exception is Merlin which licenses for a range of Independent labels.³⁵³ It should be noted here that some limited cooperation for cross-border licensing exists among the CMOs in this area. For example, GVL is the German CMO for performances and phonograms. While it offers MTL, its licenses only cover about 20 member states and is therefore not sufficient for EU- wide clearance as Europeana requires.³⁵⁴ As a result, it would be necessary in most cases to contact the record label in order to clear the rights in the records and performances. Contacting the CMOs would not be

³⁵⁰ CMO Directive, Part III. For example, the directive also establishes that a CMO not able or willing to offer MTLs for its own repertoire can mandate another CMO to do so under certain circumstances. (CMO Directive, art. 29-31).

³⁵¹ SOLAR combines the Hubs from PAECOL (GEMA) and CELAS. GEMA, *Sony/ ATV Launches Joint Venture with PRS for Music and GEMA* (https://www.gema.de/en/aktuelles/sonyatv_launches_joint_venture_with_prs_for_music_and_gema-1/, last accessed 14/9/15).

³⁵² PRS for Music, *Multi-Territorial Licensing* (<https://www.prsformusic.com/users/broadcastandonline/onlinemobile/multiterritorylicensing/Pages/default.aspx>, last accessed 10/9/15).

³⁵³ Actual membership is not known and therefore may not represent a specific Indie label in question. (<http://www.merlinnetwork.org/>, last accessed 10/9/15).

³⁵⁴ GVL, *Länderliste Webradio* (<https://www.gvl.de/rechtenutzer/webradio/laenderliste-webradio>, last accessed 10/9/15).

sufficient to clear the rights properly.³⁵⁵ Finally, there is at this point no authoritative list of HUBs and CMOs and what subject matter and rights are covered, making the process more laborious. In conclusion, the MTL licensing of musical works is entirely divorced from other subject matter, even when they are intrinsically linked such as musical works and performances.

4.2.2.4 Summary

In summary, the current licensing system has three major areas which can make licensing for CHIs via the CMO system problematic. First, CMOs do not necessarily represent all the items in a territory. This is especially acute in the context of non-commercial subject matter as the authors are less likely to be registered with a CMO. Secondly, even if a CMO has an item in its repertoire, it may not necessarily hold the relevant making available right. Thirdly, even if the CMO has the making available right, it may not be able to offer a MTL to the extent required by CHIs. In conclusion, there are major gaps in the coverage of online rights by CMOs. It is highly unlikely that CMOs could between them provide the licenses that CHIs participating in Europeana Sounds require.

As this overview has shown, the restrictions on the coverage of items, subject matter, rights and territories mean that CHIs are not able to get full license coverage by relying on the traditional CMO system. As a result, it is now necessary to take a step back and outline who can be contacted when for which purpose in the licensing process, and which effect this likely has on clearing the archival materials in practice.

4.3 Licensing Copyright- Relevant Subject Matter in Practice

As mentioned before, licensing requires three distinct steps: a) identifying and locating the owner of rights; b) negotiating a price and c) monitoring and enforcement costs.³⁵⁶ As this shows, the first step is to identify and locate the rights owner. To do this, the user essentially has to find out who owns the rights today and then find all of them to negotiate licenses. This is not necessarily as straightforward as it sounds, especially in the case of older materials or less well documented ones. For example, the author and publisher listed on the item itself may not be the right holders anymore, for whatever reasons. After all, the exclusive rights relevant here are transferable. Another situation would be that there is no name on the object at all. Either way, the right holder needs to be identified. In practice, the most comprehensive databases on protected subject matter are held by the CMOs. Based on industry structure and common practice, there are two major actors which hold information on rights ownership: a) the CMO and b) the intermediary (publisher, record label).

³⁵⁵ The benefit of contacting the CMOs nonetheless will be clarified in section 4.3.1 Rights Clearance via CMOs.

³⁵⁶ M. Kretschmer, 'Access and Reward in the Information Society: Regulating the Collective Management of Copyright' [Working Paper], p. 6.

4.3.1 Rights Clearance via CMOs

In general, CMOs have databases on their membership and can identify the right holders for a particular item if the rights are managed by them.³⁵⁷ In practice, these databases tend to be the most comprehensible source of information about right owners.

In respect to musical works, the most comprehensive database is CIS-Net,³⁵⁸ owned by FastTrack and commonly used by CMOs to identify right holders. It covers both performing and mechanical rights.³⁵⁹ This would usually include composers, lyricists, publishers, producers as well as performers. According to its documentation, it covers both musical and audio-visual works.³⁶⁰ However, the coverage of audio-visual works is very limited in practice as the scope of works and right holders represented by member CMOs shows.³⁶¹

Using this database has a number of advantages. First, it is based on the membership of CISAC, the worldwide representative body of collecting societies. Its membership therefore does go beyond Europe. It should also be noted that it actually covers more European collecting societies than its European pendant GESAC does.³⁶² Secondly, the database also provides access to other relevant sub-databases, such as ISWIC (standards and identifiers for musical works).³⁶³ As a result, it is the largest musical database worldwide, making the identification of the relevant authors and right holders more likely.

However, the coverage of the database may also not be sufficient to identify all the right holders for non-commercial material. In the absence of commercial exploitation, the only actor who may have information on right holder information is the CMOs. For example, a participant may have created other works with a commercial motive and therefore registered all of his works with a CMO. CMOs are essentially a part of the commercial exploitation system of protected subject matter, acting as the agent of the right holder. As a result, they rely on the assignment of rights by the right holder. However, if material was created without its distribution to or use by the public in mind, it is unlikely that a right holder would have registered with a CMO.³⁶⁴ This is even more so if the country in question is not the right holder's place of residence. This means in practice that CMOs are unlikely to hold information on these right holders and protected subject matter. Furthermore, the older the objects of protection are, the larger is the possibility that the rights have been transferred, for example when the author dies to his heirs. It is highly unlikely that these transfers would be appropriately documented. As a result, the chain of title is difficult if not impossible to ascertain.

³⁵⁷ D. Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', p. 8.

³⁵⁸ The focus here is on CIS-Net because it covers musical works and therefore the majority of European Sounds materials. The benefits and issues identified here however are also relevant to databases of other CMOs.

³⁵⁹ CISAC, *CIS-Net* (<http://www.cisac.org/What-We-Do/Information-Services/CIS-Net>, last accessed 10/9/15)

³⁶⁰ FastTrack, *CIS-Net Powered by FastTrack* (<http://www.fasttrackdcn.net/our-products/cis-net/>, last accessed 10/9/15).

³⁶¹ A significant proportion of CISAC members for example does not manage the rights in film works and therefore would also not feed such information into the database.

³⁶² None of the CMOs in GESAC represents Bulgaria, Estonia or Slovenia according to its membership list. GESAC, *GESAC's Members in Europe* (<http://www.authorsocieties.eu/about-us/gesac-s-members-in-europe>, last accessed 1/9/15).

³⁶³ ISWIC can also be accessed via the homepage (<http://iswcnet.cisac.org/MWI/result/list.do?localEngineCode=999&pageNumber=1>, last accessed 10/9/15).

³⁶⁴ T. Woods, 'Multi-territorial Licensing and the Evolving Role of Collective Management Organisation', p. 114.

Furthermore, CHIs will not be able to access CIS-NET directly. In its report, GESAC has argued that all access to the database would have to be carried out via a CMO and direct access for licensees is not possible.³⁶⁵ In particular, they refer to EU data protection laws preventing access. In this line of argument, the databases contain sensitive information that CMOs cannot share. Nonetheless, it should be noted that CMOs play a key role in the licensing process and direct database access could threaten this. The role of CMOs as a middle man between right holders and users is based not least on its access to information. Providing direct access to information therefore could potentially reduce this role, allowing users to contact right holders directly and therefore detracting business from the CMOs. Fast Track is owned by a number of large CMOs and so an opening up of the database in its current form is unlikely. Overall, gaining direct access is unlikely in the foreseeable future at this point.

Although CMOs have stated their willingness in terms of checking right holders on CIS-NET for participating Europeana institutions, questions remain in terms of the cost of access, the time these requests will take and how efficient the overall process will be. It is unlikely that CMOs which are unable to offer a relevant tariff would cooperate in identifying the authors and right holders via their databases. CMOs' business is based on licensing protected material. The cost of accessing information in this context is paid for by the licensing. When a CMO does not offer a relevant tariff, it would have the cost of retrieving the required information without the usual licensing payoff in return. They would therefore not benefit from granting access in the same way they would normally do. Similar questions apply to GESAC's assertion that further information on rights ownership, not included in the database, can be accessed directly via the suitable CMO, in particular their internal documentation centres.³⁶⁶ However, if the information is relevant, the question remains it has not been entered into the database in the first place? Also, who and at what cost (both financial and time) could provide access to the documentation centre? It is not clear that the effort and cost involved would be reasonable, given the large number of items that need to be cleared across Europe.

4.3.1.1 Summary

In summary, CMOs can provide support in identifying right holder and provide MTLs at least for some of the materials. CMOs have extensive databases, which list all of the relevant right holders, especially in the context of music. However, accessing these databases is more complex in practice than the theory suggests. Most databases are not publicly accessible and so all access has to be carried out by the CMOs themselves. To what extent these are willing to do so and are able to do so in a timely and cost efficient manner however depends strongly on the CMO. Furthermore, although the databases are the most comprehensive, they are not complete. In particular non-commercial materials are likely to be missing. As a result, identifying right holders remains a major issue for rights clearance.

³⁶⁵ V. Darias, 'Report on Best Practices in the Rights Clearing Process of Copyright Protected Audio Heritage In Europe and on the Applicable Legal Framework In The European Union' (http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Sounds/Other%20documents%20related%20to%20the%20project/Europeana%20Sounds%20GESAC%20Report.pdf, last accessed 13/1/16), p. 25.

³⁶⁶ *Ibid.*

In terms of Europeana, accessing the databases has the effect of clarifying how the material relates to the rights ownership. In general, CHIs’ archival material contain both commercial and non-commercial materials (see Graphic 15). Commercial materials are those subject matters which have been exploited on a substantial scale. For these, the rights are aggregated in the hands of intermediaries following the common practice in the music business. Non-commercial materials however were never made with large scale distribution in mind. In these cases, it is highly unlikely that the rights would have been transferred at all or at least not as comprehensively as the creative markets dictate.

Commercial Material	Non-commercial Material
--------------------------------	------------------------------------

Graphic 15: Archival materials in Europeana Sounds in general.

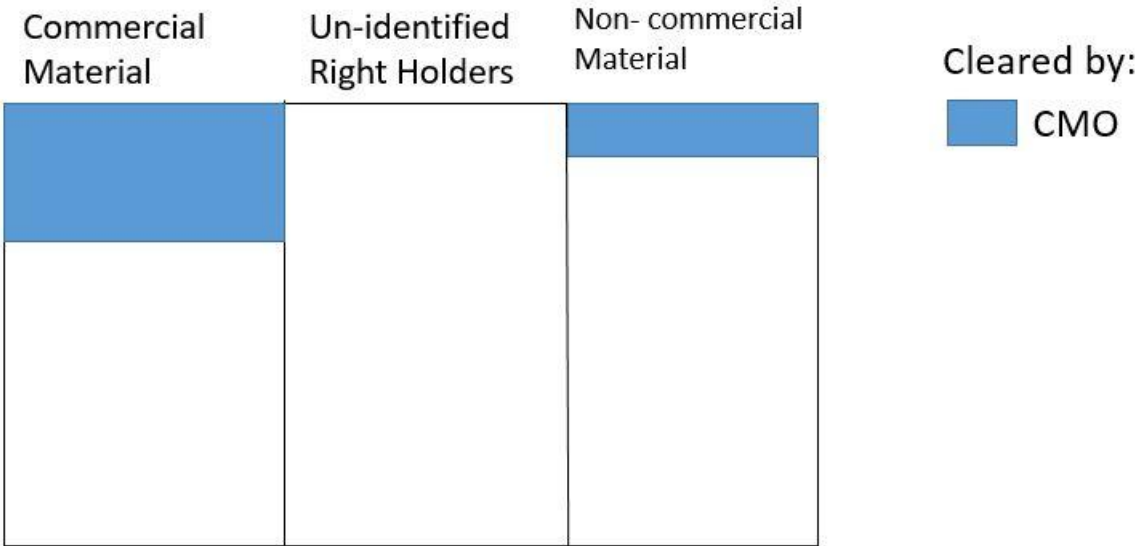
After contacting CMOs, it will be clear for what proportion of the material they can identify the rights owners. It is likely that a proportion of these for both the commercial and non-commercial materials cannot be identified given the gaps in the database. As a result, the archival material can be represented like this:

Commercial Material	Un-identified Right Holders	Non- commercial Material
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Graphic 16: Archival material in the context of Europeana Sounds, distinguishing between commercial, non-commercial and materials of unknown authorship.

If a right holder was successfully identified, the information can be used for the licensing process. The CMOs are likely to be able to provide MTLs for at least some items. These are most likely those materials which belong to its own national repertoire or are managed by it as part of the passport system. The passport system, created by the 2014 CMO Directive allows those CMOs which

can or do not want to offer MTLs themselves to mandate another CMO to this effect.³⁶⁷ The actual extent will depend on the legal context. If the licensing capabilities of CMOs are supported by a mandatory collective management provisions or ECL provisions, then the clearance will be complete for the national repertoire. In cases of presumed management, the clearance will be near complete, but gaps will remain. However, as ECL schemes are rare and especially larger right holders have withdrawn their online rights from the system, a full clearance Europe- wide is highly unlikely. A more piecemeal clearance is the result. Given the bias of CMO repertoires towards commercial materials, the amount to be cleared this way is going to be larger for commercial subject matter than for non-commercial ones.



Graphic 17: Extend to which archival materials can be cleared by CMOs.

As this Graphic 17 shows, a large proportion of the materials which require licenses are not covered. It is therefore not sufficient to only rely on CMOs for rights clearance. The next largest aggregation of rights lies with the commercial intermediaries which dominate the creative markets.

4.3.2 Rights Clearance via the Commercial Intermediaries

If CMOs are unable or unwilling to provide support, it will be necessary to contact the right holder directly to obtain both information and licenses. Commercial intermediaries, such as music publishers, record labels and film studios, focus on the commercial exploitation of protected subject matter and therefore have an incentive to co-operate with users, especially large-scale ones, as the material they hold only generate income if it is used. In other words, by providing licenses if they are not available via the CMOs, commercial intermediaries ensure the viability of an income stream.

The nature of the creative markets as described above means that the rights in object of protection tend to be concentrated in the hands of one or at least very few right holders.³⁶⁸ Given the contractual structure of the industry concerning the exclusive rights, both publishers and record labels should know who the authors and actual owner of the rights are. For example, a publisher

³⁶⁷ CMO Directive, art. 29-31.

³⁶⁸ See chapter 3, in particular the Conclusion under 3.6.

usually owns the copyright in return for royalties. As not all uses are assigned to collecting societies, the publisher is liable to pay the authors a share for the exploitation of other rights. This in return also means that they know who the authors are and who holds their rights now, for example if they have been assigned or if the author has died. The same is true for record labels and its relationship to producers and performers. They will also be able to supply information on the rights status of accompanying materials. This means that in the absence of access to CIS- NET, contacting the major publishers and record labels directly to identify the rights owners can be viable option. This is even more so as right holders within the EU are allowed to withdraw their online rights from the collective management systems. In practice, many publishers and record labels manage their online rights separately- either directly or in cooperation with a specific (set of) CMO.³⁶⁹

Special attention should be paid to the issue of older contracts. In the context of Europeana in particular, most of the items are comparatively old and therefore copyright transfers were carried out before the Internet became a mainstream phenomenon. As a result, these contracts most likely do not mention online or digital uses at all. If a contract covers the making available right depends on the purpose of the license or assignment in the first place.

In Germany, the *Zweckübertragungstheorie* (purpose of grant) determines which rights are covered, for which territories and for what timeframe.³⁷⁰ This can include new rights such as the one in question here.³⁷¹ For contracts under the 1965 Copyright Act, all of the rights necessary to fulfil the intended purpose when the assignment was made are included. The interpretation in practice favours the author as he is to benefit from the exploitation of his work.³⁷² The compensation also has to match the scope of the assignment of rights.³⁷³ If this is not the case, the author has the right to renegotiate the contract.³⁷⁴ Rights in Germany can be explicitly defined or implied in a contract.³⁷⁵ Having said this, very old materials created and contracted under the LUG/ KUG had to explicitly mention not yet known types of exploitation for them to be included in the assignment.³⁷⁶

³⁶⁹ At this stage, it needs to be pointed out that direct contact with the publisher or label is also beneficial later on the licensing process. In particular, while many CMOs cannot provide multi- territorial licenses, the right holders can.

³⁷⁰ BGH GRUR 1996, 121- *Pauschale Rechtseinräumung*, at 122.

³⁷¹ § 31(5) 1965 UrhG; BGH GRUR 2003, 234, 236 – *ERO III*, at 236.

³⁷² T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 31 para. 110.

³⁷³ § 32 1965 UrhG.

³⁷⁴ § 32(2) 1965 UrhG.

³⁷⁵ T. Dreier and G. Schulze, *Urheberrechtsgesetz, Urheberrechtswahrnehmungsgesetz, Kunsturheberrecht-Kommentar*, § 31 para. 106.

³⁷⁶ BGH GRUR 2011, 714 Tz 20 – *Der Frosch mit der Maske* at 714.

The UK has no special provisions on the assignment of rights and a global assignment is permissible, as long as it is writing. Future rights can also be assigned but the intent to do so needs to have been clearly stated.³⁷⁷ However, the scope of the assignment of new uses is also shaped by the purpose of the assignment in the sense that new uses are included to the extent that they are necessary to give the contract effect.³⁷⁸ In general, the case law tends to favour the authors, so the scope should be interpreted narrowly.³⁷⁹

In conclusion, for older items, it may be necessary to contact the author in addition to the assignee to determine who holds the making available right. This is especially the case since contractual terms are not generally known to the public.

Overall, despite these difficulties, the licensing option via the aggregators may be less cumbersome in practice than one may expect. The main advantage of this approach is that these entities can often provide multi-territorial licenses. The right holder is not tied by territoriality-based agreements in the same way as CMOs are. They therefore have the necessary leeway to issue licenses with a broader multi-territorial scope. In addition, for materials which are not part of the CMO system, the right holder would have to be contacted directly anyway. This would be mainly the case if the subject matter has not been assigned to a CMO; national provisions do not presume rights management by a CMO and no ECL scheme is in operation. In practice, the concentration of rights in the hands of intermediaries has the potential to facilitate the rights clearance process even more given the concentration of the industry in question.³⁸⁰ In the music industry for example, the publishing and record market are dominated by a very small number of firms. As a result, there is a reasonable chance that any particular work would belong to any of them.

Having said this, license fees negotiated directly with the right holder are likely to be higher in transaction costs than those negotiated with a CMO. First, CMOs have an established tariff structure and are required to publish it.³⁸¹ As a result, the licensee has an insight into the price structure and the scope of the license even before the negotiations start. These tariffs are not applicable to negotiations directly with the right holder. Negotiations may as a result require more effort and take longer than licensing via a CMO.³⁸² Secondly, the scope of the licenses in terms of items covered is likely to be narrower. This means that the licensee will have to negotiate more licenses overall than he would normally have to. For example, he may have to agree on terms with three publishers while a CMO might be able to cover them all. However, this point is only applicable if a CMO is actually able to license the rights on a multi-territorial basis. As pointed out above, this is doubtful in practice. Even if rights are assigned to HUBs, these are usually limited to sections of the

³⁷⁷ N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 5-113; *Redwood Music Ltd v B. Feldman & Co Ltd* [1979] R.P.C. 385, at 394.

³⁷⁸ *Robin Ray v Classic FM* [1998] E.C.C. 488, at 489; *Gribrook v MGN* [2011] E.C.D.R. 4, at 104-105. In particular it was held that the amount of people reached by a certain exploitation plays a role, the impact on the value of the work in other markets.

³⁷⁹ M. Kretschmer, 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda', p. 155.

³⁸⁰ For 2014 data, see for example Music Ally, *UMG lost recorded-music market share in 2014 as WMG gained* (<http://musically.com/2015/05/01/umg-lost-recorded-music-market-share-2014-wmg-gained/>), last accessed 21/9/15) or Music& Copyright, *Recorded Music Market Share Gains for WMG in 2014, Sony/ATV is the publishing leader* (<https://musicandcopyright.wordpress.com/tag/market-share/>), last accessed 21/9/15).

³⁸¹ CMO Directive, art 21(1)(c).

³⁸² C. Handke and R. Towse, '*Economics of Copyright Collecting Societies*' [working paper], p. 5.

repertoire. The licensee would therefore still have to contact more than one of them to clear the rights.

Finally, the buying and selling of back catalogues containing protected material by publishers and record labels is public information and in most cases traceable.³⁸³ The information will be easier to access than information on the transfer of individual rights which are not published as widely as industry mergers.

4.3.2.1 *Summary*

In summary, for materials which have been commercially exploited, identifying the intermediary which holds the rights can facilitate the licensing process significantly. It is current industry practice for intermediaries to bundle rights in order to facilitate their commercial exploitation. As a result, these actors will also in many cases be able to provide the required licenses to CHIs. One major benefit of this approach is that licenses can be obtained with comparatively few negotiations. Furthermore, intermediaries have direct contractual relationship with the contributors and so may be able to provide information on additional right holders which CMOs were not able to identify.

However, the intermediaries will not be able to clear all of the rights. Rights are not always assigned for the whole term of protection, meaning that especially older commercial materials may have reverted back to the original author or maker. Furthermore, the contracts on older subject matter may not grant them the making available right at all or not on a multi-territorial basis. Finally, this route will not be available to non-commercial materials and therefore be not applicable to a substantial proportion of CHI archives.

Going back to the larger picture, the rights clearance via the commercial intermediary is only going to have an effect on the clearance of commercial materials. However, here the impact can be significant at comparatively little cost. In addition, given the contractual relationships in the industry, the intermediary can most likely identify right holders that the CMOs may not have been able to. For example, in the case of works related to booklets such as its text and the cover art.

³⁸³ These sales are often announced in industry newspapers as part of the common industry practice.



Graphic 18: Progress of rights clearance after contacting CMOs and commercial intermediaries.

For all materials which cannot be cleared this way, it is necessary to contact the individual author or maker- in other words the first copyright owner as defined by law or his heirs.

4.3.3 Rights Clearance via Individual Right Holders

When neither a CMO nor a rights aggregator can provide licenses, the original individual right holder needs to be contacted. As mentioned before, in some cases CMOs or aggregators may be able to provide information on right holders they do not represent. In addition, basic information such as the name of the author can be found, for example, written on the work or related material. However, the accuracy of the information will be an issue, especially if a lot of time has passed. Furthermore, locating the right holders is difficult in the absence of centralised systems. In practice, little more than an online search is feasible in most cases. While the absence of centralised right holder information poses a problem for all types of protected subject matter, this issue is especially pronounced for objects of protection which include a large number of right holders.

For example, archival materials to be included as part of Europeana Sounds includes recordings of plays. Dramatic pieces or plays are assembled under different provisions than films given that they are meant to be performed on stage rather than be recorded. For example, the copyright in the script of a dramatic work commonly stays with its author, even in the UK.³⁸⁴ The rights clearance process crucially depends on the circumstances under which the play was recorded. In cases where the recordings were designed to be distributed, it is common that the producer would have cleared the underlying rights for the exploitation. If the recording was not made with distribution in mind, it is highly unlikely that all of the affected copyrights, such as the dramatic work itself, the director’s contribution, stage costumes, choreography, etc were cleared sufficiently by the producer of the recording. In these cases, all of the rights would have to be cleared with the right holder individually, in addition to the producer of the recording. As a result, it depends on the

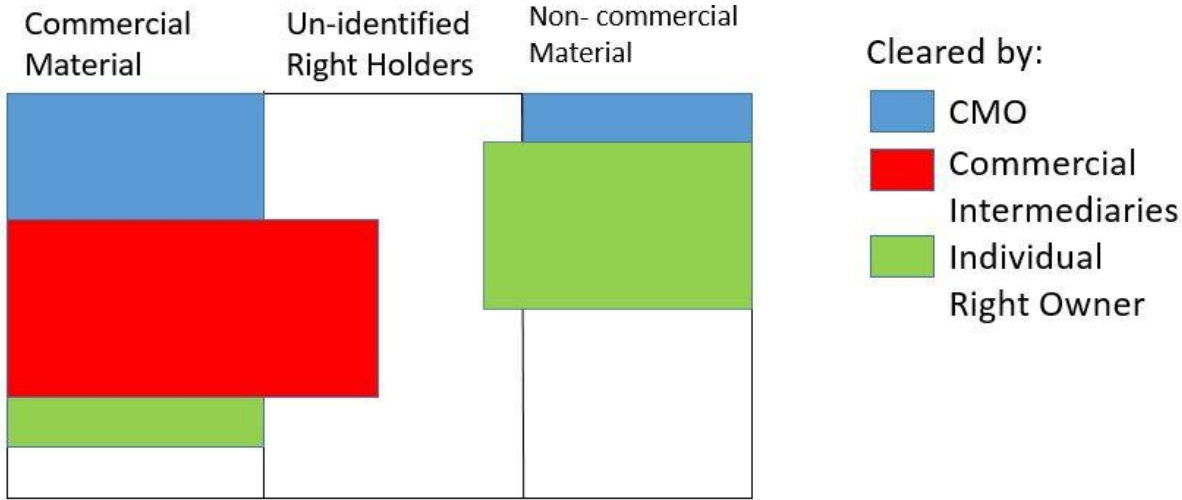
³⁸⁴ Writer’s Guild GB, *WGGB- Independent Theatre Council agreement* (https://writersguild.org.uk/wp-content/uploads/2015/02/ITC_terms_conditions_2003.pdf , last accessed 7/9/15), C.1; see also M. Murza, *Urheberrecht von Choreografen*, p. 306; In the case of more successful plays, the producer may have an option to acquire ancillary rights in the UK. N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, para. 26-305. Collective agreements are not available for Germany and the UK.

circumstances in which the recording was made if the underlying copyrights have to be cleared separately.

4.3.3.1 Summary

In conclusion, if neither the CMO nor the right aggregator are able to license an object of protection, individual right holders need to be identified and contacted. This is a time consuming and cumbersome process, especially if materials are complex and include a large number of right holders. In these cases in particular it is essential to identify all of the protected subject matter involved correctly and comprehensively to avoid infringement.

At the end of this process, the rights process in terms of materials in the context of Europeana Sounds will look like this:



Graphic 19: Progress of rights clearance after contacting CMOs, right aggregators and individual right owners.

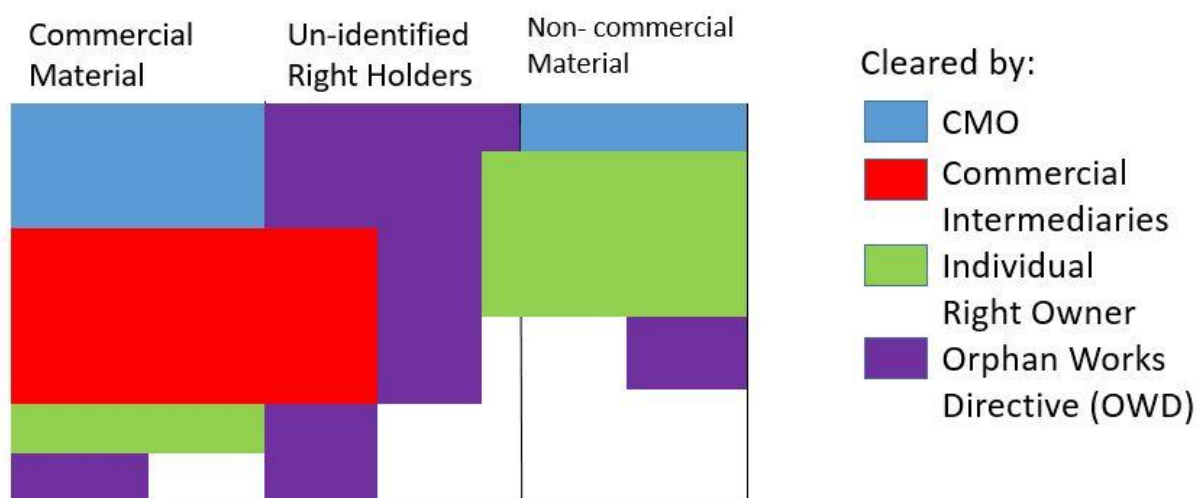
One thing to note is that identifying one participant in a non-commercial material can lead to identifying other participants and therefore right holders. The smaller the production, the bigger the chance of this because individual participants are more likely to know each other. As a result, licensing via the individual can reduce the proportion of unidentified right holders. However, as the graphic also shows, not all subject matter will be cleared at this stage.

4.3.4 Other Licensing Options

As is clear from the previous discussion, not all protected subjected matter held in CHI archives can be licensed successfully. Negotiating a license is in particular not possible for subject matter of unknown authorship or where the right holder cannot be located. This issue has been recognised by the legislator in the form of the Orphan Works Directive (OWD).

The OWD enables certain types of institutions to exploit materials if the right owner cannot be identified or located. The OWD requires institutions to carry out a diligent search for the author/right holder, the details of which vary by type of subject matter and country. Once this has been carried out and properly documented as defined by national law, the permitted uses allow the institution to put the material online. The Directive is available to libraries, museums and archival

institutions which are publicly accessible, or film and sound heritage institutions as well as public service broadcasters.³⁸⁵ In practical terms, it is likely that CHIs active in Europeana Sounds meet these requirements.



Graphic 20: Progress of the rights clearance after contacting CMOs, aggregators, individuals and relying on the OWD.

However, the directive is limited in scope as it does not apply to all subject matter to the same extent. First, the directive does not apply to stand-alone photographs or images.³⁸⁶ In other words, whenever there is an image which is not part of another work, for example by being included in a book, the rights cannot be cleared using this directive. Secondly, the directive only applies to materials which were first published, broadcast or made publicly available within the EU.³⁸⁷ This issue will most likely be relevant if items have been imported, for example from colonies. Thirdly, broadcasts are only within the scope of the directive if their first broadcast was before 31/12/2002. It therefore does not apply to new broadcasts but only older ones. As a result of these limitations, there will be a proportion of the archival material which cannot be cleared.

This will include both commercial and non-commercial material as well as where the author is known or unknown. The gaps in the area of identified authors refers to those objects of protection which are not covered by the OWD or where licenses are refused by the rights holder or his heirs. In any of these circumstances though, it is up to the institution to decide how to proceed given that all licensing avenues are essentially exhausted.

4.3.5 Permission Issues in addition to Copyright: the Ethical Dimension

In addition to the copyright challenges, the specific nature of some of the non-commercial content raises ethical concerns in the context of digitization. There are recordings which were intended to document a specific event or culture rather than to commercially exploit the recording thereafter. The issues discussed in the content may be deeply personal or affect communities at large.

³⁸⁵ U. Suthersanen and M. Frabboni, 'The Orphan Works Directive', in I. Stamatoudi and P. Torremans (eds.), *EU Copyright Law- A Commentary* (Cheltenham: Edward Elgar, 2014), pp. 57-58.

³⁸⁶ U. Suthersanen and M. Frabboni, 'The Orphan Works Directive', p. 161.

³⁸⁷ U. Suthersanen and M. Frabboni, 'The Orphan Works Directive', p. 161.

The WIPO guidelines state that

*'prior consent is necessary before using (part of) such material for commercial purposes, regardless of copyright status.'*³⁸⁸

Although Europeana is not a commercial use, the accessibility of material online is significantly larger than for analogue items. It has to be considered that participants do mind this difference, especially as it is nearly impossible to retract materials once they have been made available online. Secondly, the OWD also requires that protected subject matter is only made available online if the author can be presumed not to object.³⁸⁹ As a result, unless unknown future uses were discussed with participants and preferably included in the documentation, digitising these materials should only be done with the consent from the participants.³⁹⁰ Given the lack of commercial component and copyright relevance, it is unlikely that CMOs can provide support in this area.

One possible solution could be to contact the affected community. For example, if interviews were made about soldier's experiences in World War II, contacting veteran organisations can provide insights. On one hand, discussing the content with community leaders can provide insight into how contentious the content actually is from the viewpoint of those affected and well versed in the cultural context surrounding it. On the other hand, contacting the affected community may allow for the identification and/ or location of the people recorded. It is unlikely that individuals in research projects on minority issues would have been chosen at random. Rather, active participation in such projects could indicate community links and maybe even activism. As a result, using the community's communication tools can be helpful. For example, placing advertisement in community newspapers or on message boards, especially online, may establish the required contact either to the person directly or someone who knows them.

4.3.5.1 Summary

In conclusion, after all the copyright- relevant stakeholders have been identified and permissions sought, another look needs to be taken at the material itself in a broader sense. Making materials available online, especially if they were never intended to be so broadly accessible, can pose ethical challenges. To assess and overcome these hurdles, it is recommended that the affected community is contacted. This way, both the extent of issues can be identified more accurately and permissions can be sought where this is deemed necessary.

³⁸⁸ L. Kalshoven, *Summary Report on Barriers to Online Access to Out-of-Commerce and Domain Constrained Audio Work*

(http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Sounds/Deliverables/EuropeanaSounds-D3.2-Summary-Report-on-barriers-to-online-accessv2.0.pdf, last accessed 14/9/15), p. 20

³⁸⁹ This applies to works not previously made public (published or broadcast), Directive on the Permitted Uses of Orphan Works (Directive 2012/28/EU) (Orphan Works Directive), art. 1(3) and recital 12.

³⁹⁰ The conflict has been discussed in detail in the context of digitisation by WIPO. (M. Torsen and J. Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures* (http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf, last accessed 10/9/15), especially p. 54).

4.4 The Cost of Licenses

In addition to the coverage licenses, their characteristics have to be kept in mind because it significantly affects the cost of the license. The cost of a license crucially depends on how the fee to be paid is calculated. Tariffs usually include a number of key factors when assessing how much a user should pay. First, it considers the type of use in question, in particular the importance of the protected subject matter for the specific use. For example, background music in a dentist's office is going to be charged less than music played in a club. Secondly, tariffs consider the extent of use. For internet based uses, this refers mainly to the revenue and traffic generated by the service. Finally, there are jurisdictions which consider the nature of the use or institution, especially cultural uses. GEMA for example offers a 15% rebate for non-commercial cultural, religious and social concerts.³⁹¹ However, this consideration of aim is not an established in all member states yet and currently under attack by right holders as exemplified by GESAC.³⁹²

GESAC argues that the public interest mission of Europeana, or any other licensee for this matter, should not be taken into account when a tariff is set. Instead, GESAC proposes that license fees should be based on the type of use as well as the traffic generated by it. In this vein, Europeana institutions are compared directly to commercial services such as Spotify and SoundCloud. The core argument is that CHIs have to pay for all essential equipment and required services and music should not be an exception to this.³⁹³ However, the service a library provides is not comparable to commercial entities and there a number of issues with the GESAC proposal.

GESAC argues these kinds of non-commercial rebates are distorting competition and probably breach EU legislation. This is not necessarily the case. First, taking non-commercial aims into account in setting the licensing terms has been already established at EU level in the Orphan Works Directive. It states explicitly that member states

*'For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rightholders.'*³⁹⁴

Furthermore, the EU recognises cultural policy as a valid endeavour more broadly.³⁹⁵ For example, it actively supports policies aimed at cultural diversity. Member states already actively support certain genres with subsidies ensuring the creation of works, for example in the area of classical music and niche music for cultural diversity. Secondly, copyright has specific goals, one of

³⁹¹ GEMA, *Vergütungssätze U-K für Konzerte der Unterhaltungsmusik und Wortkabarett (Wortkabarett, Comedy u.Ä.)* (https://www.gema.de/fileadmin/user_upload/Musiknutzer/Tarife/Tarife_AD/tarif_u_k.pdf, last accessed 10/9/15); § 13(3)(4) Urheberwahrnehmungsgesetz.

³⁹² V. Darias, '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', pp. 27-28. This report reflects GESAC's response to the concerns raised by CHIs in a survey in the context of Europeana Sounds.

³⁹³ Original justification by GESAC argues that since they pay for office supplies etc, they also need to pay for the music. V. Darias, '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', p.27.

³⁹⁴ Orphan Works Directive, recital 18.

³⁹⁵ For a detailed discussion of this and EU competences as well as their interaction, see A. Ramalho, 'Conceptualising the European Union's Competence in Copyright- What Can the EU Do?', *International Review of Intellectual Property and Competition Law*, 2014, Vol. 45, No. 2, pp. 178- 200.

which is the access to materials for socially beneficial purposes. This is clearly visible in copyright exceptions, many of which at both the EU and the national level cover non-commercial activities seen as highly valuable for society as a whole.

Thirdly, tariffs exclusively based on the extent of use would penalise Europeana for becoming successful and therefore fulfilling an EU public policy goal. The GESAC proposal would mean that the larger and more widely used Europeana becomes, the higher the licensing fees would be: wider usage entails more traffic and therefore higher licensing fees. This in turn would provide a significant disincentive for the Europeana member institutions to participate. It would also drive up the cost of the overall project which are financed by public money to a significant extent. Institutions offering large sections of their collections in above average quality would be especially penalised. In summary, although remuneration should be paid, this public interest mission has to be taken into account, for example by tariff rebates.

Furthermore, GESAC also argues that the cost of licenses should not vary between member states. It refers back to the *Kanal 5* and *Tournier* case in which the CJEU stated that similar license fees should apply unless there are objective reasons. The specific *Tournier* paragraph (para. 38), refers to dominant undertakings, now covered by article 102 TFEU. Case law has established limitations, in particular it offers a defence for differential pricing based on objective justifications. Different retail prices can be justified by a range of different factors, including taxation and labour costs as well as different parity in currencies.³⁹⁶ In practice, the magnitude of the competitive harm and the degree of dominance have to be weighed against the nature and magnitude of the benefits and the advantages to the consumer.³⁹⁷ A conduct that can maximise the long-term social welfare of the EU is one possible defence here and effective licensing and the successful preservation and making available of Europe's cultural heritage can most likely meet these requirements. In addition, if the license was to be priced the same across Europe, the question arises which member state should act as the standard. Income levels, financing practice and levels for public institutions as well as commercial tariffs vary significantly across the member states. As a result, a standard based on a wealthy member state could be prohibitively expensive for a newer, less wealthy member state. In turn, licensing fees based on a less well-off member state may be unacceptably low to right holders in the more affluent ones.

Finally, GESAC also proposes that rather than digitising works themselves, Europeana could link to commercial services already offering a work. However, this approach is highly problematic in practice. First, the preservation of cultural heritage plays a significant role in Europeana. It is the aim of ensuring the accessibility of materials to the public which is driving member institutions. In the context of limited resources, it is highly unlikely that CHIs will prioritise content for digitisation which are already available on commercial services. Furthermore, even if the content was available on another service, linking to it is not without challenges. On one hand, it is unlikely that a service would permit large-scale linking to its items without some kind of compensation. On the other hand, the availability of the material cannot be guaranteed. If the commercial provider was to use a pay-wall, it is not clear how Europeana linking to this content would facilitate its mission to make the Europe's cultural heritage more accessible. Furthermore, to ensure the coherence of the collection, it would

³⁹⁶ A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC', *Common Market Law Review*, 2007, Vol. 44, p. 1738.

³⁹⁷ R. Nazzini, 'Defences' in R. Nazzini (ed.), *The Foundations of European Union Competition Law- The Objective and Principles of Article 102* (Oxford: Oxford University Press, 2011), p. 309.

require monitoring these links in case works are taken offline or removed by the commercial providers. It is therefore not necessarily a simpler, more efficient or cheaper option.

4.4.1 Summary

In summary, identifying the right holder is not the only practical issue. In fact, unless licenses are affordable and workable for the CHI, the success of Europeana Sounds and therefore making Europe's musical and sound heritage available to a larger audience, will be negatively affected. At this stage, what constitutes an affordable license is still very much debated as the analysis has shown. Not only may the cost vary according to who issues it (CMO or individual right holder), but the criteria for assessing the extent of use in balance with the public interest mission of CHIs is still highly debated. Discussions range from what indicators to use, to benchmarking license fees against a particular member state to rebates for public interest uses. In fact, the tariff context is more uncertain here in the realm of cross-national uses than it is for more traditional exploitations managed by CMOs on a territorial basis. Overall, it should be kept in mind that the public interest is and has always been an integral part of copyright protection. Furthermore, the aim of licensing systems is to facilitate the use of material in return for fair compensation. In other words, the balance has to be struck in such a way to ensure the viability of the project as whole.

5. Facilitating the Licensing Process: Recommendations

As this report has demonstrated, there are a number of specific issues which affect the licensing of materials in the context of Europeana Sounds. They represent hurdles that a user has to overcome in order to determine the status of an item and where relevant acquire all of the necessary licenses. As such, each one of them increases the transaction cost. This section makes specific recommendations to reduce the cost of digitisation in the context of Europeana Sounds. In the first part, the focus is at EU level. The second section then moves on to the individual institutions, highlighting how they can facilitate the process.

5.1 EU Level

Recommendation 1: Further harmonise the definition of protected subject matter and originality.

The first set of issues is related to the incomplete harmonization of copyright law at the EU level. In the context of Europeana Sounds, this mainly refers to differences in the definition of protected subject matter, the originality threshold and terminology. First, as the classification of dances has shown, there remains variation in how subject matter is classified and therefore potentially also which set of regulations apply to it. This can lead to inconsistencies in practice because other sections of the legislation distinguish rules based on the type of material. For example, the requirements of a diligent search in the Orphan Rights Directive relies on different parameters according to the type of subject matter. Similarly, the terms used in copyright and licenses and their precise definition (terminology) varies across countries, potentially causing gaps in coverage. It is not clear how individual institutions can be expected to know the law in all member states- not least given the absence of translations of statutes and case law. It is also not an option to rely on the rules of the strictest member state as this would raise the cost of licenses, especially the associated transaction cost in identifying right holders and the usage fees.

Another area of variation is caused by the differences in the originality threshold. What is protected in one member state may fail to be considered sufficiently original in another one. This has significant repercussions for the licensing process. An institution which has determined that the material is not protected in its country of origin does not need licenses. However, as the material is to be made available EU-wide, the institution may find itself infringing the rights in another member state. To facilitate the process, a more comprehensive harmonization at European level is required in terms of terminology, subject matter type definitions and the minimum threshold of originality.³⁹⁸ In the current situation, it is only a question of time until the CJEU will have to step in. However, this process is slow and piecemeal at best. It is also not clear if it would lead to the desired results. As a result, the harmonisation task should be carried out by the EU legislators to ensure a timely and coherent solution. Alternatively, the licensing could be based entirely on the national requirements and provide complete protection against infringement claims to the institutions if they have complied with national law.

³⁹⁸ It should be noted that the CJEU is actively seeking to harmonise the level of originality, as discussed in section 2.1 What is a 'Work'?

Recommendation 2: Establish a comprehensive, publicly accessible register of European CMOs and major right holders which includes information on the subject matter, rights and ownership they cover.

In the absence of easily accessible multi-territorial licenses, institutions will have to contact collecting societies in other territories. However, there is currently no reliable register of European collecting societies and Hubs that covers all right holders for all sectors and uses. Under the CMO Directive, notifications will have to be made by member states to the Commission by 10/4/2016 but it is not clear if a comprehensive, continuously- updated register will be made available to the public. It is also not viable to rely on associations representing collecting societies in Europe. For example, there are gaps in the GESAC's EU member state coverage: none of the CMOs represents Bulgaria, Estonia or Slovenia³⁹⁹ and the Croatian member HDS ZAMP does not represent publishers.⁴⁰⁰ The EU legislator needs to ensure that there is a publicly accessible register of relevant rights management institutions covering the whole EU and all relevant copyrights and neighbouring rights. Ideally, a register would also include contact details as well as information on the repertoire of those large scale right holders that manage their rights individually. This database should be integrated with the licensing information of other European sectors to facilitate rights clearance across sectors.

Recommendation 3: The legislator needs to provide legal certainty for CHIs against infringement claims if they have complied with national law.

As the report has shown, not all materials in copyright are subject to collective licensing. While a special regime has been created for Orphan Works,⁴⁰¹ issues remain if a CMO issues licences for items it does not actually administer (non-members). There are a range of options possible for the extension of licensing agreements to non- members. Germany has a presumption of CMO membership. This means that although membership itself is not compulsory, the effect of membership is.⁴⁰² Denmark's legislation has an ECL scheme for digital uses but it has not been applied in practice.⁴⁰³ Either way, a comprehensive license from the relevant CMO or right holder has to provide legal certainty to the CHI that it will not be subject to infringement claims. This is especially important in the context of Europeana Sounds as the multitude of jurisdictions, rights holders and licensing terms increase the possibilities of gaps in the coverage of licenses. A licensing scheme, for example ECL, should be given cross- border recognition as long as the CHI which licenses the material has complied with the national provisions. It is not sufficient if CMOs or member states do this on their own, given the large number of territories and CMOs involved in the licensing

³⁹⁹ GESAC, *GESAC's Members in Europe* (<http://www.authorsocieties.eu/about-us/gesac-s-members-in-europe>, last accessed 1/9/15).

⁴⁰⁰ HDS ZAMP (<http://www.zamp.hr/o-nama/ovo-je-hds-zamp/pregled/439/tko-smo-mi>, last accessed 17/6/15).

⁴⁰¹ The Orphan Works Directive has only limited coverage, namely books, audiovisual works and phonograms. Photographs among other works are not covered. In addition, it requires a diligent search which is very resource- consuming in practice, making it not a viable option for most CHIs in the context of large-scale projects.

⁴⁰² D. Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', p. 26.

⁴⁰³ D. Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', p. 21; For a detailed discussion of ECL systems, including their design, strengths and weaknesses in the EU context, please see J. Axhamn and L. Guibault, *'Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage? Final report prepared for EuropeanaConnect'*.

process. Instead, action at EU level is required. One possibility to achieve this aim with little legislative change required would be to give EU-wide recognition to ECL- type schemes which rely on the 'country of origin' principle. An ECL scheme following this route would apply to materials first published in the member state in question, by a prescribed type of (cultural heritage) institution for a defined purpose. The CHIs conclude an agreement with the relevant national CMOs, covering both members and non- members, and publish it online. As long as national law is complied with, the scheme would then be recognised across Europe, allowing for Europe- wide access to digital objects made available under the scheme.⁴⁰⁴

5.2 Institutional Level

Recommendation 4: CMOs should provide CHIs with comprehensive access to relevant databases, in particular CIS-Net.

To facilitate the licensing process, it is essential that users gain access to the databases to support them in identifying right holders, held by individual rights management organisations (most notably CMOs). Although disputed today, the principle that users should also have access has been established in the past. The Global Repertoire Database (GRD) project⁴⁰⁵ was initiated by Commissioner N. Kroes in 2008, as part of the Online Commerce Roundtable. Its discussions included a wide range of stakeholders, including PRS for Music, iTunes and EMI Publishing. It states among its aims that '*Users of the GRD will be able to access data held via a dedicated GRD online portal...* '⁴⁰⁶ It is also recognised that '*Licensees will require Licensor Information at a sufficiently granular level to identify and validate copyright and financial claims and to operate license agreement in the most efficient manner.*'⁴⁰⁷

In line with this, several CMOs provide access to their databases in a limited format to users, for example for GEMA.⁴⁰⁸ This shows that it is technologically feasible and has been implemented in the past.

In this context, CMOs need to lay the foundation for access by CHIs. The main reason to deny database access has been based on data protection issues, for example by GESAC in relation to CIS-

⁴⁰⁴ For a more detailed discussion of this option, its strengths and weaknesses, please see L. Guibault, "Cultural Heritage Online? Settle it in the Country of Origin of the Work", *JIPITEC*, 6(3) (forthcoming).

⁴⁰⁵ At some point, in addition to the International Confederation of Publishers as well as internet service providers such as Google and iTunes <http://www.musikmarkt.de/Aktuell/News/Aus-fuer-die-Global-Repertoire-Database-PRS-will-Alternative>, a number of CMOs GEMA, PRS for Music, SACEM, STIM, ASCAP, BUMRA- STEMRA, SABAM, SGAE, SIAE, SOCAN and UBC all agreed with to participate and ICE was the selected technology provider. However, the project faulted over funding as costs spiralled. (Music Week, *Global Repertoire Database: Future of Crucial Project Hangs in the Balance* (<http://www.musicweek.com/news/read/global-rights-database-future-of-crucial-project-hangs-in-the-balance/058852>, last accessed 10/9/15). The project collapsed in 2014.

⁴⁰⁶ Deloitte, *Global Repertoire Database Scoping & Stakeholder Consultation Phase Draft Recommendations* (2012) (<http://www.globalrepertoiredatabase.com/docs/grd-deloitte-final-draft-study-phase-recommendations-v5.1.pdf>, last accessed 17/7/15), p. 11.

⁴⁰⁷ Deloitte, *Global Repertoire Database Scoping & Stakeholder Consultation Phase Draft Recommendations*, p.11.

⁴⁰⁸ GEMA, *Online Database- Musical Works* (<https://online.gema.de/werke/search.faces>, last accessed 10/9/15).

Net.⁴⁰⁹ Even in the current situation, if data protection is an actual issue crucially depends on the details of the data protection arrangement each CMO has with its members. For example, if the CMOs remain the data controllers and have a very narrow data protection statement, then EU data protection rules could prevent direct access by Europeana institutions. However, if the data protection arrangements refer to the more general purpose of, for example, 'royalty collection', then limited access by users may be permissible, especially if the data controller is FastTrack. Asking for direct consent from the members would in any case provide a legitimate basis for access from a data protection point of view. This would provide a fast and efficient remedy to one of the major obstacles to licensing protected subject matter: identifying the relevant right holder. At the same time, it would have a limited impact on the data subject because the relevant information is already made available in some member states on the collecting societies' national homepages. There is no need to disclose information beyond what is required to identify rights ownership.

Recommendation 5: CMOs need to coordinate their licensing practices and conditions.

Furthermore, CMOs need to coordinate their multi-territorial licensing conditions. This requires a number of distinct steps in practice. Licenses and their terms have to be absolutely clear and easy to understand. They therefore should be written with the final end-user in mind.⁴¹⁰ Across the EU, the mission of Europeana is best served if all users have the same rights and it prevents accidental infringement. This will require in practice that the terminology used in the licenses is also coordinated. Furthermore, the applicable tariffs should be comparable across countries, specifically taking into consideration the public interest mission of the Europeana project. However, the fees need to be based on the local situation to ensure that the project is viable and institutions from all member states can participate on a level playing field. In addition, tariffs need to be coordinated across border to prevent licensing gaps.⁴¹¹ This is especially important as comparing 28 agreements in terms of their coverage, permissions and prohibitions in the absence of harmonised terminology and licenses practices is a highly complex task, making accidental infringement more likely.

Recommendation 6: CHIs should contact affected communities when digital objects pose ethical issues.

To ensure that ethical issues are handled with the necessary care that they require,⁴¹² CHIs should establish an active working relationship with the communities affected and document all efforts comprehensively. Doing so would help determining the nature of the challenges involved, if there are any, as well as possibly locate the individuals directly affected. Furthermore, consulting the community in question would document that at the minimum an effort was made to resolve the

⁴⁰⁹ V. Darias, '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', p. 25.

⁴¹⁰ T. Woods, 'Multi- territorial Licensing and the Evolving Role of Collective Management Organisation', pp. 127-128.

⁴¹¹ L. Guibault, 'Creative Commons: Struggling to "Keep it Simple"', pp. 1-9.

⁴¹² For details on ethical issues, please see section 4.3.5 Permission Issues in Addition to Copyright: the Ethical Dimension.

issues. This can be especially important if problems arise after the materials were made available online.

Recommendation 7: CHIs need to document all right holder information in an openly accessible format.

More generally, CHIs should make the right holder information they hold publicly available.⁴¹³ This refers to the information CHIs hold in relation to their own collection. For example, if authorship has been determined as part of a diligent search under the Orphan Works Directive, CHIs should make this information not only available via the Orphan Works directories as legally required, but also via their own catalogue. This way, the exchange of information can be facilitated between all stakeholders while at the same time prevent the duplication of efforts. Furthermore, CHIs should also ensure the proper documentation of relevant information at the time material is made/ or acquired. When an item is created, for example interviews are recorded, the names and addresses of individual participants should be noted. This includes both the right holders under copyright law as well as other participants, such as the interviewee. Coherent information like this makes rights clearance for whatever purpose easier because it provides a valid starting point for the search. The documentation also needs to be centrally stored as well as attached to the physical copy of the object, so that it does not get separated from it. In addition, all participants in a project should be required to sign a waiver covering the use of the final product in the context of the purpose for which it was made. For example, if an individual was interviewed about his experiences in the war as part of a research project, both the interviewer and the interviewee should give the institution a non-exclusive license covering all of their copyright and neighbouring rights- relevant contributions. Ideally, this would also cover currently unknown uses. It should be noted that if a topic is sensitive, a waiver which is too broad may deter participation. As a result, the purpose of the material, for example education or research, should be clearly stated in a technologically neutral manner. Care should also be taken that the waiver covers copyright, neighbouring rights as well as ethical concerns that an object may raise.

⁴¹³ As with the CMO databases, information can be limited to what is actually necessary to ensure privacy concerns are met: see in particular Recommendation 4.