



Verbal statement at the European Commission Public Hearing on Orphan Works,
26th October, 2009, Brussels.

Panel 1: Orphan Works – challenges and opportunities

I am the Director of EBLIDA and represent the libraries of Europe. We’re here to discuss the orphan works “problem”: why current law does not allow the exploitation of these works and what we should do about it.

Currently the only option for digitizing some orphan works in some European countries is through extended collective licensing with right holders organizations. I would like to explain to you why in addition to that option, we need to have a mandatory exception to copyright available in all Member States.

We are in the middle of the transition from the print-based library to the digital library. The digital library makes its material available to its patrons online and in digital formats by communicating via computer networks. In order for European libraries to fulfil their role as digital libraries, large-scale digitisation projects are necessary and Europeana is one of them.

Libraries already hold copies of items which are of great potential value to the information society – not just books but photos, letters, recordings, newspapers and magazines. Libraries increasingly have the technical means and knowledge required to digitize en masse, and they have the responsibility to build a global digital library for the preservation of and access to these items for existing and future generations. I must emphasise that libraries have no wish, and no need, to digitise works which are available through normal commercial channels. However, certain obstacles stand in their way of which the digitization of so-called orphan works is probably one of the most simple to remove.

To understand the problem better, we can look at digitization in three steps:

1. understanding if permission is needed to digitize an item and if it is needed, obtaining that permission,
2. the technical conversion of the items from analogue to digital format,
3. the making of the digital items available to the user.

The first step involves knowing if the item is in copyright or in the public domain. Items in the public domain require no permission or remuneration and the library can move straight onto the second and third steps of converting the items into digital format and making them available to the public. We can be pretty sure that items produced before 1850 are all in the public domain and that is why most digital libraries contain only these very old items.

However, it is the more recent items that are of greater value to education, research and the information society, and a great number of these items are not of any commercial value. If a right holder is identified and gives permission then the digitization can take place. However, orphan works have no known right holder who can grant permission without which the item cannot therefore be digitized. The search for such right holders is so costly and time-consuming, with such little guarantee of success, that libraries simply do not pursue it for many items.



A lecturer recently contacted his library to explain that he would like to include an extract from a copyright work in the notes for students on the university's secure intranet. He knew that he needed permission to do this. He knew that the author had died as recently as the 1980s. But he had died without leaving a will and his property was divided 50:50 between two nephews, who themselves had since died. One nephew had one child, the other had three. He asked if it was really necessary to obtain permission from all four great-nephews to make the extract available to his students. The answer of course, is yes, and the problem will become only greater over the next 50 years of its copyright term. If any of these right holders were to not respond to the question asking permission, then the extract could not be distributed to the students. Imagine if the item had been written in the 1920s by an author whose birth and death were unknown, how much more difficult the task of securing permission would be. Or a photograph taken in battle in 1940 by an unknown photographer.

Although the commission has helped compile guidelines for the reasonable investigation that can be expected, the item still cannot be digitized nor made available to the public without the right holder's permission.

In the Scandinavian countries, there has been a long tradition of extended collective licensing in specific cases. Denmark has recently adjusted its rules providing the collecting societies or other rights holder's organisations with a general authorisation to conclude extended collective licensing agreements, provided rights holders have the possibility to opt-out. This also applies for general agreements in cases when rights holders are not members of the collecting society making the agreement, or when rights holders cannot be identified or located. However, legislation is always needed to permit extended collective licensing. It isn't an easy solution because it's not always clear that extended licensing permits licences on behalf of remote heirs of creators.

We also believe that there is no justice in a collecting society, or any body, receiving substantial income from works whose right holders have lost all interest in them and which anyway often have little commercial value. For that reason alone, we should like libraries to have the option of using an exception which frees them from legal risk if they digitize an orphan work.

There are other good reasons to create a mandatory exception:

1. A mandatory exception to copyright avoids the legal illogicality of a 'licensing' scheme which cannot, by definition, be valid, in the absence of the right holder as a party to the agreement. Any 'licensing' scheme for orphan works needs legislative sanction and so such schemes themselves actually incorporate a kind of 'exception' in law, allowing a licence to be issued when no one is truly competent to do so.
2. A mandatory exception allowing the use of orphan works avoids the payment of fees or negotiating of terms for items that may actually already be outside their copyright term due to the unknown date of death of the original right holder. It is clearly inefficient to 'license' – and pay – for the use of significant numbers of works which in reality have passed beyond their copyright term and are in the public domain.



3. Licensing schemes require negotiation, so their inherent bureaucracy makes them an alternative which is more costly to the public purse.

4. Licensing schemes normally require payment by the licensee. This constitutes another cost to public finances and is difficult to justify when the potential beneficiary of the payment is unlikely to appear.

5. Licensing schemes govern the digitization and publication within national boundaries and therefore the terms of such licences potentially vary between countries and make pan-European digital libraries like Europeana, even national-level digital libraries, a nightmare to manage. A mandatory exception would give the same rules to all countries and all digital collections.

A mandatory exception in copyright legislation allowing digitization if a reasonable investigation has taken place would potentially release millions of items and help to make them available to the European public.

If licensing has to be the solution, then we would urge the Commission to set limitations to make sure that the costs charged are reasonable for the items to be digitized. And of course, it should be ensured that it is not possible to undermine other exceptions with such a contract.

We can suggest wording for the type of exception that needs to be added to the copyright Directive which you can read on my slide (reproduced below).

For addition to Article 5 (3) of the copyright Directive, draft for discussion offered to indicate the kind of exception that libraries are looking for:

Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(p) uses by publicly accessible libraries, educational establishments, museums or archives of a work whose author cannot be identified or located after reasonable investigation conducted for the purpose by the institution concerned; provided that the author’s moral rights are as far as possible respected and that the use shall cease on the request of a legitimate right-holder should he subsequently become known.

This proposal goes beyond what is currently permitted by recital 40 in allowing on-line delivery of digital reproductions of a work. But we believe this exception is justified by the public benefit that would accrue in releasing for general enjoyment many millions of works whose right-holders are not available to grant permission for the use. Though recital 40 favours the promotion of contracts or licences, we have explained why such legal solutions are not available when the right holder is not identifiable or available to become a party to the



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agreement and the advantages of a mandatory exception over licensing to a European-wide digital library, such as Europeana.

We urge the Commission to consider the huge benefits that a simple mandatory exception would produce for the growth of the information society today.

I have summarized my points on my final slide (below) and thank the Commission for the opportunity to present these today.

- Europe needs a mandatory exception in order to be able to build a pan-European digital library.
- In order to identify a work as orphan the concept of “reasonable investigation” must be defined so that the required search is simple and cost-efficient enough to allow mass digitization.
- Licensing is also effective for some works in some cases in some circumstances.

For further information please contact:
Joanne Yeomans, EBLIDA
PO BOX 16359
NL-2500 BJ The Hague
Email: joanne.yeomans@eblida.org