



**Proposal for discussion at the Comité des Sâges’ public hearing, 28 October 2010
Orphan Works – Issues and Solutions**

EBLIDA, the European Bureau of Library, Information and Documentation Associations, recommends a solution of the Orphan Works problem along the lines described in this paper.

Introduction

It has become a political goal of European culture policy to establish a European database or information system, Europeana, giving online access to European cultural products. For this project to succeed, it would require digitisation of European books, journals and other culture products on a massive scale.

If Europeana shall contain works published in recent times, i.e. works for which the term of copyright protection has expired, this requires either

- an exception or other sort of legal mechanism allowing the digitisation and making available to the public of the works,
- or
- a license agreement with the authors and other rights holders, or organisations, e.g. collecting societies, representing these rights holders.

The European copyright legislation does not contain a specific exception permitting libraries to digitise protected works and make them available to the public outside the library, and in the majority of EU Member States, collecting societies can only enter license agreements on behalf of their members. But, how is it possible to clear the rights of works of authors and other rights holders who are not members of a collecting society and cannot be located? That is the Orphan Works problem.

Libraries do not want to digitise “orphan works” as such. They want to digitise certain types or classes of protected works, some of which may be orphan. The typical digitisation projects concern mass digitisation, i.e. digitisation of types or classes of works which are no longer subject to commercial exploitation. The clearing of rights in these cases concerns two “copyright relevant” actions: digitisation and making available to the public.

Digitisation

Depending on the national implementation of art. 5.2.c and 5.3.n of the Information Society Directive, libraries may digitise protected works without any license agreement with rights holders. However, in many (perhaps even most) Member States a license to digitize will be necessary.

Making available to the public

It is the ambition of Europeana that the digitised material should be made available to the public outside the premises of the library. The whole point of Europeana is to create a common European entry to the digitised European Cultural Heritage.

This implies that on-site access in accordance with art 5.3.n of the Information Society Directive will not be sufficient. Either there must be an exception allowing remote access, or, because of the number of rights holders involved, rights must be cleared on a collective basis with rights holder’s organizations, e.g. collecting societies or other authorized organizations.

Extended collective licensing

In the Nordic countries a collecting society may have a legal mandate to engage in collective license agreements which are not only binding for members of the collecting society but also binding also for rights owners who are not members of the organization. If the rights to digitize and make available to

the public are cleared on the basis of an extended collective licensing agreement, the license agreement covers all works of the specified type or class. Whether some or all works may be orphan, is not relevant.

Whether the rights owners are identifiable and locatable first becomes an issue when the collecting society shall redistribute revenue to the rights holders. Under extended collective licensing, the orphan works problem boils down to an issue of redistribution of revenue by collecting societies.

Exception

Another solution may be an exception allowing an authorized body or organisation in the country of origin to deem works to be orphan and grant permission to use these works in specified ways. Such solutions are seen in Canada and Hungary.

This requires that the institutions wanting to digitize and make certain classes of works available to the public, must identify those works which may be orphan. To do this would require that searches or investigations have been conducted in order to satisfy the criteria for being classified as orphan set up by the Authorizing body. If the criteria are met the Authorizing body may then give the desired permissions. The rest of the works of the class, those which are not orphan, may be cleared by collective licensing agreements with respect to those rights owners who are members of the collecting society, and must be cleared by individual agreements with respect to the rest.

The transaction costs involved in this process will probably be prohibitive, except for relatively small and well defined collections, which can be defined *en bloc* as being orphan.

An important issue, then, would be to specify some additional criteria that might be used by the Authorizing Body to grant permissions, e.g.:

- For monographs the decisive test whether a work may be deemed orphan or not, is whether rights holders are found in the ARROW system or not. If rights holders cannot be identified and located in ARROW the work is by definition orphan.
- Out-of-print works which have been commercially unavailable for a defined period of years, and there is no intention by rights owners to re-publish the work. The period of commercial unavailability may vary according to type of works.
- Cut-off-points. I.e. a decision by the Authorizing body allowing works of specified types, published before a specified year and not commercially available, to be digitized and made available to the public. (E.g. newspapers published before 1920.) Cut off points may vary according to types of works and other circumstances. No one-size-fits-all principle.

Mutual recognition of solutions

Both these solutions imply a compulsory element with respect to rights owners who are not asked to give permission; either because their permission is not required or because they have not been found. The basis for these solutions is, therefore, an authorisation to the Collecting Society or the Authorizing Body given in the national legislation of the Member States.

Copyright legislation is territorially limited, and cross border copyright protection is based on reciprocal protection. This means that both these solutions are not valid across borders in other Member States, and thus would not make it possible for Europeana to give access to all material in all the Member States of the European Union.

What is needed, therefore, is a mechanism, within the legal framework of the Community, of mutual recognition by Member States of their solutions.

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