Digitizing out of commerce and orphan works – a (critical) french perspective

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The initial situation

- Stasse Report (2005): first propositions to digitize the « grey zone » of books (out of commerce works)
- 2009: Google Books convicted in France for violation of copyright law (opt out system)
- 2010: first attempt to vote a law in France for orphan works (photographies)

But lot of uncertainty about ownership of rights on out of commerce works...
2012: Law on « unavailable books » and ReLIRE system

An hybrid collective management of rights for « unavailable books » before 2001, with opt-out for authors and publishers
Strong oppositions from (some) authors

- Unavailable books are not out of commerce book
- Publishers breach their contractual obligations when books become out of commerce
- Therefore rights on out of commerce works should return to authors
- The law is unbalanced in favor of publishers
- Authors have to opt-out / a licence is proposed to publishers by the collective management society
- Accusations of « state piracy »

March 2014: Law challenged in courts by authors, but not annulled by Constitutionnal Council. Trial still pending before the Council of State
Criticisms from a librarian perspective

- The ReLIRE project is strongly dependent on public funding
- Digitization will be conducted on the collections of the French National Library (BnF)
- **But no public access on the digitized books will be possible**
- ReLIRE is only a commercial project
- No pedagogic or research uses
- No distinction between general literature and academic books
- No national licence
- No possibility to display this books on Europeana

Strong contrast with the Google Books Case in USA and consequent fair use development (Hathi Trust Case)
Questions on the economic model

- Publishers were very reluctant to participate to the funding of the ReLIRE system because of lack of rentability.
- Low perspectives with individual consumers (old books, DRM, etc.).
- Selling licences to french libraries?
- What will be the position of french consortium?
- What is the sustainability of the ReLIRE system?
Orphan works, the ReLIRE system and the European directive

- The French law on unavailable books doesn't deal directly with orphan works.
- But with an opt out system, orphan works will be included in unavailable books.
- Possibility for libraries to ask for a licence for "unreclaimed" books after 10 years.
- But books can't be displayed on Internet, only on secured networks to library users.

Uncertainty about the articulation of the French law and the European directive on orphan works. Finally, the two systems could co-exist.
Alternatives?

- Bokhyla project in Norway: extended collective licence for a national open access for books
- Fair use developments in USA after the Google Books Case and benefits for libraries
- Europeana response to the public consultation on copyright reform: a new exception for libraries to digitize and display on Internet out of commerce works, with opt out for rights holders
Question of strategy for libraries?

- Orphan works and out of commerce works are just symptoms of deep pathologies that affect the copyright system.
- Copyright lasts too long, no registration system of works, use of works considered as a prejudice.
- No real « right » for the public to access and use works, just limited exceptions.

Is it possible to find a real solution to the orphan and out of commerce works problem just with copyright exceptions?
Orphan works, out of commerce works and legalization of sharing

- Propositions to legalize non-commercial sharing of works on Internet
- In a situation where sharing is legalized, orphan and out of commerce works could be displayed on Internet by libraries
- With a flat rate system, rights holders could have a remuneration for their works

With the legalization of non-commercial sharing, the problem of orphan and out of commerce works will be strongly limited.