



### Memorandum of Understanding on Diligent Search Guidelines for Orphan Works

In the framework of the European Digital Libraries (EDL) Initiative, EBLIDA alongside other representatives of right holders and cultural institutions signed on 4 June in Brussels a Memorandum of Understanding (MoU) on Diligent Search Guidelines for Orphan Works (<http://www.eblida.org/uploads/eblida/2/1213704515.pdf>).

The MoU agrees on "that the due diligence guidelines [Joint Report and relevant Sector Report(s)] should be observed, to the extent applicable, when searching for right holders and that a work can only be considered orphan if the relevant criteria, including the documentation of the process, have been followed without finding the right holders".

They have also agreed "to promote the guidelines as acceptable standards for due diligence in dealing with orphan works across the European Union, and to encourage their national member organisations or entities to relate the generic information resources provided in the Joint Report and the Sector Reports to national resources, when and where applicable" and "to encourage and support the further development of tools and mechanisms to facilitate the lawful use of orphan works, and to advocate for measures suitable to prevent future orphan works".

The Commission has been invited to "call upon the signatories to review the implementation of the guidelines after an appropriate period of time, such as one year".

The signatories to the MoU are ACE, AEPO-ARTIS, the Bibliothèque nationale de France (BNF), the British Library (BL), BSAC, Conference of European National Librarians (CENL), EBLIDA, the European Federation of Journalists (EFJ), EFCA, ENPA, EVA, the European Writers' Congress, the Federation of European Publishers (FEP), FAEP, FERA, FIAPF, GESAC, the International Association of Scientific, Technical and Medical Publishers (STM), ICMP/CIEM, FIAD, the International Federation of Phonographic Industry (IFPI), the International Federation of Reproduction Rights Organisations (IFRRO), PYRAMIDE EUROPE and UK National Archives.

For further information on the EDL Initiative visit [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/hleg/hleg\\_meetings/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/hleg/hleg_meetings/index_en.htm).

### Orphan works

**The Danish solution: Extended collective licensing**  
By Harald von Hiemcrone, Member of EBLIDA-EGIL Group, State and University Library of Aarhus, Denmark

In Denmark the main issue on the copyright agenda for the last two years has been to solve the problems presented by orphan works. In 2006 the Ministry of Culture, which is in charge of copyright legislation in Denmark, invited all interested parties to join a working group in order to find a solution to the orphan works problem.

Already at the first meeting there was agreement that the proper solution to the orphan works problem would be extended collective licensing. The question was how this should be construed in order to most effectively solve the problem.

In 1961 the Nordic countries harmonised their copyright legislation and since this revision they have had extended collective licensing. There may be differences in detail, but the system consists of the same basic elements:

- ◆ Rights holders for a certain type of works or in a certain field must be grouped in organisations, e.g. collecting societies, that are representative in the specific field, and the organisation must be mandated to conclude licence agreements on their behalf.
- ◆ The copyright law prescribes that within specific areas licence agreements, concluded by a collecting society authorised to do so, are extended to apply also to rights holders, who are not member of the organisation.
- ◆ Rights holders who are not members of the organisation shall be treated in the same way as members, and in addition they may in some cases have the right to individual remuneration and the right to opt out, i.e. to prohibit the use of the work in spite of the licence agreement.
- ◆ There are different solutions when the parties have not been able to conclude an agreement: mediation, arbitration or no remedies. In Denmark there may be arbitration in specific cases mentioned in the law.

When the InfoSoc Directive was negotiated the representatives from the Nordic Countries were very anxious that extended collective licensing should be possible within the framework of the Directive. This wish was granted as Recital 18 states that "this Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences."

There are differences between the Nordic countries as to which types of cases allow for extended collective licensing. In Denmark extended collective licensing is possible in the following cases:

- ◆ Reproduction for educational uses
- ◆ Reproduction for uses in firms and institutions
- ◆ Reproduction for transmission by e-mail of digitised copies of library material to library users or other libraries in Denmark
- ◆ Reproduction of radio or television programmes for the use of persons with visual or auditory impairments.
- ◆ Reproduction for the use in art books
- ◆ For the broadcasting of published works
- ◆ For the retransmission by cable of broadcasted programmes
- ◆ For the rebroadcast or on demand communication to the public by broadcasters of their own productions.

Now, instead of introducing orphan works as a new case for extended collective licensing, it was agreed to introduce a general provision in the law, that certain organisations (i.e. collecting societies) may be authorised by the Ministry of Culture to conclude extended collective licensing agreements. There are three important factors:

1. The agreements may concern in principle any type of work and any type of use, not only the use of orphan works. Whether the agreement is very specific or very general - it is up to the contracting parties to decide. As such the solution provides a maximum of flexibility.
2. There is no provision for arbitration if the parties cannot agree, so there is no pressure on the rights holders. They engage in truly free negotiations from which they can at any time withdraw.
3. There is also a possibility for non-members of the collecting society to opt out of the license agreement.

#### *Ad 1.*

Flexibility is much in demand. The wish for an exception to right holders rights often stumble on the fact, that they cannot be made so specific that they do not violate the three step test. A contract for the use on some protected material, however, can be made just as specific as is necessary or desired, in order not to violate the commercial or other interests of the rights holder.

#### *Ad 2.*

Libraries would have preferred that arbitration or, at least, mediation had been possible. Compared to the staff of the collecting societies, librarians are amateurs when it comes to negotiate license agreements. The possibility that an arbitrator or mediator could intervene might lead to a wholesome sobering up of the types of arguments used and demands made.

#### *Ad 3.*

For mass digitisation projects it is of minimal importance if an author or some other individual right holder opts out. What is important is that only personal right holders opt out, and not producers, e.g. publishers, prohibiting the use of all the works they have published.

### *Remuneration*

It is important to be aware of the fact that this solution is not for free. Libraries may only get these licenses at a price. This may seem odd. Orphan works are orphans because one cannot find the rights holder, so why should one pay a licence fee to a collecting society, when the collecting society cannot find the right holder in order to remunerate him for the use of the work in question. For this reason some may prefer the American solution, where you perform the diligent search for the right holder and only have to pay if the right holder turns up and claims a fee.

This may well go for individual works, but when it comes to mass digitisation projects, e.g. of journals or news papers, it is not possible to make searches for rights holders. Even superficial searches for authors of journal or newspaper articles would incur prohibitive costs. In these cases you need a collective agreement for the use, and specific rules on diligent searches will not do.

In order to be exempted from liability for copyright infringement the library needs a contract with the collecting society which then is liable in relation to the rights holders. And, of course, no one will take that responsibility without payment – if for no other reason, then because the collecting society may eventually be met with demands from rights holders who realise that their work has been used, and the collecting society must be able to meet those demands. The collecting societies also have rules as to how to dispose of unused funds. Usually they are used distributed as grants to young artists, writers &c.

The price to pay – also for the use of orphan works – is the price for legal certainty in a well regulated market.

### *Conclusion*

The new rule for extended collective licensing is expected to come into force in July 2008. This means that the possibility to solve copyright problems by concluding license agreements is radically improved. Now the challenge – both to right holders and to libraries – will be to make use of this opportunity. It will not be easy, and we will use much time and energy in negotiating reasonable agreements. The problems are not solved, but we have got the means for solving them.

### **Online Consultation to review the Public Sector Information (PSI) Directive**

**By Carmen Morlon, EU Information Officer**

The EU's Public Sector Information (PSI) Directive of 2003 offers means for public sector bodies to enhance the reuse of their information resources across the EU. All EU-27 have now transposed the Directive in their national laws. Belgium announced that it had done so on 8 May 2008, following the judgement of the European Court of Justice of 13 December 2007 (C-2006/528).

The Commission has recently launched a public consultation ([http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/online\\_consultation/review.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/online_consultation/review.pdf)) aimed at evaluating the corresponding national laws in preparation of a review which is due by the end of this year. Open until 31

July 2008, the consultation aims at gathering information from interested parties, in particular public sector content holders and commercial and non-commercial re-users (universities, NGOs) on their views on different aspects related to the implementation, impact and scope of the PSI Directive. The results will feed into the debate regarding the review of the PSI Directive.

As regards its scope, the Commission will analyse whether cultural establishments, education and research organisations and public service broadcasters ("excluded sectors"), currently out of the scope, ought to be covered by the Directive.

The wide majority of European cultural establishments, education and research organisations and public service broadcasters hold amongst their collections a considerable amount of valuable material, which is widely disseminated and preserved to realise various cultural, educational and economic goals. These sectors are also interested in the potential commercial and non commercial re-use of this material.

The Commission is asking whether it would be appropriate to include the "excluded sectors" within the scope of the Directive as well as what would be the impact and societal benefits of including them within the scope of the Directive and what are the problems these 'excluded sectors' may encounter should they be included.

Comments and replies should be sent by post [European Commission, DG INFSO, Unit E-4 Digital Libraries and Public Sector Information - *For the attention of Mr Javier Hernandez-Ros*], email: [info-psihelp@ec.europa.eu](mailto:info-psihelp@ec.europa.eu) or [http://ec.europa.eu/information\\_society/policy/psi/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/index_en.htm). Contributions will be published at the above-mentioned website. See the European Commission's monitoring of the transposition of the PSI Directive in the EU-27 at [http://ec.europa.eu/information\\_society/policy/psi/actions\\_eu/policy\\_actions/monitoring/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/actions_eu/policy_actions/monitoring/index_en.htm).

#### **From the Secretariat - EBLIDA is looking to appoint a new Director latest from January 2009**

EBLIDA, the European Bureau of Library, Documentation and Information Associations, is an independent non-governmental and non-commercial umbrella association of national library, information, documentation and archive associations and individual institutions in Europe.

The major objectives of EBLIDA are:

- ◆ to serve and promote the interests of the library, archive and information professions and to lobby for them amongst the European institutions
- ◆ to give members up-to-date information, supported by monitoring processes, on all relevant developments in the European Union
- ◆ to foster cooperation between the members and with other pan European organisations and initiatives in the library and archive sector

The new Director will be responsible for consolidating the role of the Bureau as the leading voice and prime focus for library, archive and information activities at European level,

as major pieces of legislation and initiatives affecting the World Information Society come into force. The Director reports directly to the President.

This is an exciting time to act as a key player lobbying on behalf of and representing the views of library, archive and information professionals in European processes and institutions at all levels. Developments in global information, social and economic policies bring threats from commercial rights owners and this role offers an opportunity to deepen sector co-operation and further develop professional profiles for the benefit of all European citizens.

EBLIDA is looking for some one who demonstrates commitment to the objectives of the Bureau and who is prepared to work for their achievement. The role includes a strong lobbying element and requires diplomatic co-ordination of national approaches to pan European issues affecting the sectors. Self-credibility in both political and professional arenas is essential as is the ability to articulate and disseminate outcomes, clearly and succinctly to members.

The ideal candidate will possess good academic and professional qualifications, will be familiar with the institutions and procedures of the European Union, as well as current issues and trends in European libraries and archives, especially those relating to the digital environment. Fluent spoken and written English and preferably working knowledge of at least one other EU language is basic.

Excellent presentation, communication, organisational and analytical skills are essential as is the ability to network and build partnerships. Especially important is the ability to communicate complex issues in clear and concise English. The successful candidate will be flexible in their approach to work, be a motivated self-starter who will enjoy working independently in a small secretariat.

The role requires extensive travel and irregular hours. In return it will provide you with a unique opportunity to establish your personal reputation within a European context. You will work alongside prestigious, senior professionals, stake holders and policy decision makers at national and pan European levels, enhancing your own network of contacts for your future development.

The post is located at the EBLIDA office in The Hague. Salary and contract will be negotiated with the EBLIDA President. This appointment is a three-year contract, and is subject to Dutch law.

The closing date for applications is **20<sup>th</sup> August 2008**. Interviews will take place in Vienna (Austria) on 16<sup>th</sup> September 2008.

Please send a full CV with details of two professional referees plus a statement (approx. 300 words) on the candidate's view of EBLIDA as an organisation to: [ebtida@debibliotheken.nl](mailto:ebtida@debibliotheken.nl) (*subject: Application New Director*). The job description can be found at <http://www.eblida.org>. Further information can be obtained from Andrew Cranfield.