



The Proposed Orphan Works Directive: A Solution for Mass Digitization?

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Outline

1. What is the problem of 'orphan works'?
2. How does the proposed directive aim to solve it?
3. First flaw: cross-border use
4. Second flaw: wrong problem
5. An alternative approach



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The Problem of Orphan Works

- Copyright owner cannot be found despite reasonable search efforts
- An orphan work cannot legally be used
 - Unless an exception or limitation applies
- Obvious problem – ‘black hole’
 - Artistic derivative works
 - Re-use for commercial purposes
 - Digitization and online libraries
 - Applies to text, music, photographs, movies etc.



Scale of the problem

- Causes
 - Long copyright protection term
 - Inheritance of rights
 - Transfers
 - Absence of registration
- Seems to be quite large
 - Text
 - 13% of books in European libraries (3 million)
 - 10-40% of written material held by libraries
 - 95% of newspaper material from before 1912
 - Film and TV
 - 10% of commercial film and TV productions
 - 225.000 films in European archives
 - Photography
 - 90-95% of older or unpublished photography
 - 78% of recent works
 - Sound
 - >50%
 - NB oldest copyrighted work may date back to the 1860s!



Towards a European Solution

- Need for a legal basis in national law
- Why a European solution?
 1. InfoSoc Directive: closed list of exceptions and limitations
 2. Online accessibility of European cultural heritage
 - i2010 Digital Libraries Initiative
 - Europeana
 - Recommendation (2006/585/EC)
 - Not succesful
 - Digital Agenda for Europe (2010)
 - Harmonised approach to allow cross-border access



The Proposed Directive (1)

- Definition of orphan work (art. 2):
 - Unlocatable or unidentifiable rightholder
 - Diligent search required (art. 3):
 - Consultation of indicated sources required
 - In Member State of first publication only
- Scope (art. 1)
 - Publicly accessible libraries, archives, educational establishments, museums, and public service broadcasting organisations
 - Limited types of works:
 - Books, journals newspapers, magazines or other writings;
 - Cinematographic or audiovisual works contained in the archives of film heritage institutions or public broadcasting organisations
 - Does not include sound recordings, photographs, maps etc.
 - Published works only
 - First publication must be in one of the Member States



The Proposed Directive (2)

- Permitted uses (art. 6)
 - Making available
 - Digitization (reproduction)
 - Non-commercial purposes only: preservation, restoration and providing access to cultural/educational material
 - But see art. 7: other purposes may be authorised if remuneration is provided
- No right of remuneration?
- Rightholder can end orphan work status (art. 5)
- Mutual recognition of orphan status (art. 4)



First Flaw: Cross-border Use

- Multiple laws apply to an online library:
 - Location of act of making available
 - Lex protectionis (Rome II, art. 8)
- The proposed Directive does not provide for a uniform solution
 - Mutual recognition applies to OW status only
- Different mechanisms may exist: uncertainty
 - Different conditions for use
 - Prior authorisation or not
- Mutual recognition requires registration and verification of diligent search efforts: administrative burden



Second Flaw: Wrong Problem

- Rights clearance is a transaction problem
- Orphan works are only one aspect of this problem (excessively high transaction costs or no transaction possible)
- But mass rights clearance always involves impossible transaction costs, also if the rightholder can be found:
 - Austria: 200.000 dissertations: €3-7.5 mln
 - Netherlands: 1.000 history books: 8 yrs.
 - US: 343 monographs: €34.000
 - BBC TV Archive (400.000hrs): 800 people for 3 yrs, at £72 mln
 - All costs exclude potential remuneration!
- Individual rights clearance is too expensive and takes too long
- A solution is needed to lower transaction costs in general by facilitating mass rights clearance, not relying on diligent search



Alternative: Extended Collective Licencing

- Build on voluntary collective management
- ECL: repertoire of CMO can be extended by law to cover all works worldwide
 - CMO must represent a 'substantial number' of copyright owners
 - Easy opt-out
 - Individual remuneration
- Very low transaction costs
- No orphan works can occur
- Multi-territorial licencing could easily be arranged through a one-stop shop or agreements between domestic CMOs
- Advantages over GBS



Thank you for your attention!

EU Documents:

- Proposal for an Orphan Works Directive, COM(2011)289FIN (24 May 2011)
- Digital Agenda 2010-2020, COM(2010)245FIN
- *The New Renaissance*, Report of the Comité des Sages (10 January 2011)
- Recommendation on the digitisation and online accessibility of cultural material and digital preservation, 2006/585/EC (26 August 2006); and its progress reports: First progress report, COM(2008)513; Second Progress Report, November 2010 (working document)
- High Level Expert Group, *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works* of 4 June 2008
- Agnieszka Vetulani, *The Problem of Orphan Works in the EU: An overview of legislative solutions and main actions in this field* (European Commission, DG Information Society and Media, Unit E4 – Digital Libraries and public sector information), February 2008
- Anna Vuopala, *Assessment of the Orphan Works issue and Costs for Rights Clearance* (European Commission, DG Information Society and Media, Unit E4 – Access to Information), May 2010
- (Many documents available on: http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm)

General literature:

- S. van Gompel, 'Unlocking the potential of pre-existing content: how to address the issue of orphan works in Europe?', *IIC (International Review of Intellectual Property and Competition Law)* 2007, p. 669-702
- D.W.K. Khong, 'Orphan Works, abandonware and the missing market for copyrighted goods', *International Journal of Law and Technology* 2007, vol.15, p. 54-89
- G. Spindler & J. Heckmann, 'Retrodigitalisierung verwaister Printpublikationen; Die Nutzungsmöglichkeiten von "orphan works" de lege lata und ferenda', *GRUR Int* 2008, p. 271 et seq
- A. Ringnald, 'National and International Dimensions of Copyright Law in the Internet Age. Harmonizing Exemptions: The Case of Orphan Works', 17 [2009] *European Review of Private Law*, p. 895-923
- M. van Echoud (ed.), *Harmonizing European Copyright Law: the Challenges of Better Law Making*, The Hague, Kluwer Law International 2009, p. 263-296
- T. Koskinen-Olsson, 'Digital libraries: collective administration for online libraries – a rightsholders' dream or an outdated illusion?', in: L. Bently, U. Suthersanen & P. Torremans, *Global Copyright*, Cheltenham, Edward Elgar 2010, p. 252-264
- T. Lüder, 'The "orphan works" challenge', 2010 *GRUR Int.*, p. 677-685
- S. Van Gompel & P.B. Hugenholtz, *The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It*, 8 [2010] *Popular Communication*, 61-71
- A. Ringnald, 'Orphan Works, Mass Rights Clearance and Online Libraries: The Flaws of the Draft Orphan Works Directive and Extended Collective Licensing as a Solution', *Medien und Recht International (MR-Int)* 2011, vol. 8-1, pp. 3-11
- J. Axham & L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, August 2011 (www.ivir.nl)

