



## 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    - 90-95% of older or unpublished photography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](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
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- G. Spindler & J. Heckmann, 'Retrodigitalisierung verwaister Printpublikationen; Die Nutzungsmöglichkeiten von "orphan works" de lege lata und ferenda', *GRUR Int* 2008, p. 271 et seq
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- 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](http://www.ivir.nl))

