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ARROW

Guidelines for the Definition of Orphan Works

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¹ OJ L 79, 24.3.2005, p. 1.

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ARROW and the principles of the High Level Expert Group on digital libraries for orphan works

At the very basis of the ARROW project is the need for cultural institutions to identify the rights holders of books still under authors' rights protection in order to request a permission to make the work available over the internet and to have legal certainty in doing so.

A number of the books contained in the collections of the European libraries will be considered as orphan books as their rights holders cannot be identified (this is assumed to be quite rare) or located (which is expected to be more likely).

After having conducted an ARROW search, the cultural institutions will receive information about the status of the book whether it is in print, out of print or whether the rights holders could not be identified or located and the book is likely to be considered as an orphan work.

When drafting the ARROW project, the partners agreed that it would be very important to work on guidelines for the definition of an orphan works and even more important to work on guidelines with regards to information sources which should be queried in order to perform a due diligent search. They therefore agreed to submit a deliverable dealing with that issue.

During the approval period of the project, some of the partners of ARROW worked within the High Level Experts Group on digital libraries chaired by Commissioner Reding and addressed specifically the issue of orphan works. They work, within the copyright subgroup of the HLEG on a definition of orphan works, guidelines to perform a due diligent search and Rights Clearance Centers (Annex 1). In parallel, sector specific guidelines were agreed by the stakeholders of each sector gathering within 4 Working Groups (Annex 3) and a Memorandum of Understanding on due diligent search (Annex 2) was signed in June 2008.

Because of these important milestones did not need to be repeated, during the first Management Board meeting of the ARROW, it was therefore agreed that the ARROW project would work on the basis of the work of the HLEG and the sectoral Working Groups. In the reports annexed to this deliverable, ARROW is seen as a practical implementation of the guidelines and other recommendations of the HLEG and Working Groups.

The Guidelines for the definition of Orphan Works are based on the work of the EC i2010 digital libraries High Level Experts Group (HLEG) chaired by Commissioner Reding and its copyright subgroup which addressed specifically the issue of orphan works. Their final reports provided a definition of orphan works; criteria for Rights Clearance Centres for Orphan Works (Annex 1); criteria for Orphan Works databases; and general and sector specific guidelines to perform due diligent search for rights holders to copyright works (Annex 3). The instruments were developed jointly and agreed to by stakeholders concerned including representatives of authors, publishers, RROs (Reproduction Rights Organisations) and libraries. The stakeholders committed to observing the due diligent search guidelines through the signing of a Memorandum of Understanding (Annex 2) currently signed by 27 organisations.

The HLEG agreed on a definition of orphan works: *“An orphan work is a work protected by copyright but the current owner is unknown or untraceable by diligent search.”* The diligent search working group further noted that *“The current owner of the copyright might be the author or other*

creator, some other first owner if the rights (such as the author's employer -when applicable) or a publisher) or any right holder who is presumed to be the right holder according to the legislation or contractual agreement or any successor of the first owner.”

The HELG also agreed that in order to qualify a work as orphan, a due diligent search would have to be performed in available sources to try to identify the rights holders and/or locate them. Guidelines on “due diligence” needed to be based on what is reasonable under the circumstances. The due diligent search should be conducted in the country of publication when it was known as determined by national rights holders.

For the implementation of the orphan works definition relevant available sources for due diligent search for rights holders are:

- i. Orphan works registries (when established)
- ii. The relevant sources identified by the HLEG and annexed as Annex 2, in particular Clause 2.2
- iii. The catalogue of the library or other institution or company making a request to digitise a work
- iv. The catalogue of The European Library (TEL)
- v. The Virtual International Authority File (VIAF)
- vi. The Books in Print database in the country of the digitising institution and in the one in the country of origin of the work when different from the country of origin of the digitising library
- vii. The registries of the RRO in the country of the digitising institution and in registries of the RRO in the country of origin of the work when different from the country of origin of the digitising library

The RRO or other rights clearer duly authorised to administer orphan works shall control and certify that appropriate search for rights holders has been carried out in accordance with criteria established by national rights holders and subsequently declare the work as orphan. It will further register the work in the appropriate orphan works registry and, when appropriate include information on when a new search for rights holders to the work is to be carried out.

The principles and steps listed above represent sufficient practical guidelines for the implementation of the orphan works definition and to declare a work to be orphan whenever the rights holder is not identified or located.

They also form the basis for the building of the relevant part of the ARROW system. ARROW is seen as a practical implementation of the orphan works definition, diligent search guidelines and other tools and recommendations of the HLEG and its subgroups. After having conducted an ARROW search, the cultural institutions will receive information about the status of the book whether it is in print, out of print or whether the rights holders could not be identified or located and the book is likely to be considered as an orphan work.

ANNEX 1

04/06/08

i2010: Digital Libraries

High Level Expert Group – Copyright Subgroup

Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works

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The present report follows an **Interim Report on Digital Preservation, Orphan and Out-of-Print works**, presented by the Copyright Subgroup at the second meeting of the High Level Expert Group on 17 October 2006 and the **Report on Digital Preservation, Orphan Works, and Out-of-Print Works** presented at the third meeting of 14 April 2007.

The Interim report is available at

http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/interim_report_16_10_06.pdf

The second Report is available at
http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295

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Extracts of the report dealing with orphan works

5. ORPHAN WORKS¹⁴

5.1 OVERVIEW

Clarification and transparency in the copyright status of a work is an essential element in the European Digital Library initiative. In some cases rightholders cannot be identified or, if they can be identified, they cannot be located, hence the term “orphan”. Comprehensive, large scale digitisation and online accessibility could be greatly hampered, if adequate solutions are not found to the problem of orphan works.

From the beginning, the Copyright Subgroup concluded that it is important to offer solutions to orphan works. It acknowledges that various voluntary and regulatory mechanisms to facilitate the use orphan works exist in different countries, and new proposals are pending. It also shares the view, expressed by the Commission Recommendation of 24 August 2006, that this is an area where Member States, in consultation with the stakeholders, need to formulate policies. Based on that approach, the Copyright Subgroup emphasised the need for interoperability and introduced the concept of mutual recognition of national solutions as a possible way forward.

Under all voluntary or regulatory measures, there needs to be guidance on what constitutes diligent search required before the use of a work. Stakeholders in different cultural sectors confirmed the view of the Copyright Subgroup that due diligence guidelines can best be established in collaboration with rightholders and cultural institutions. Based on that understanding, the Commission invited representatives of several stakeholders to discuss and agree upon due diligence guidelines for four creative sectors on European level. The European level guidelines including generic information resources can be linked to national resources (such as the name and contact details of a Collective management organisation (CMO)), thereby establishing a map of available information resources across Europe.

The development of databases of information on orphan works can facilitate users in their search. The rationale of a database is to provide assistance to users in their search. The interlinking of national databases and registries is needed to achieve a common multilingual access point and a European-wide resource. In this, different cultural institutions, such as libraries, archives and museums, can contribute their varied resources (catalogues, bibliographies, filmographies etc.) and their specific expertise.

Aiming to ensure interoperability, enhance coordination and facilitate a multilingual access point, the Copyright Subgroup has developed a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works (see below Section 9). As a result of preliminary work in this area, it appears that this will be implemented as a test-base in a forthcoming project, called ARROW¹⁵, short listed by the Commission under the eContent Plus Programme. Several representatives of rightholders and cultural institutions are partners in the project. Development of a rights clearance procedure and a Rights Clearance Centre (or centres) to grant licences to use orphan works is another proposal by the Copyright Subgroup. Rights clearance can take place where licences are offered by a mechanism set up by rightholders. This is an integral part of the ARROW Project.

At the same time, the Copyright Subgroup has advocated suitable measures to minimise the quantity of future orphan works, which occur basically as a result of missing or inadequate information. Improved inclusion of metadata (information on rightholders and rights) in the digital material will be one measure to eliminate or diminish future orphans. CMOs or other intermediaries can play an active role in finding out the status of a work. Good practices in the Member States - regulatory measures, voluntary mechanisms or combinations of both - are important. Some mechanisms already exist and more are forthcoming. The Copyright Subgroup also stresses the crucial role of the Commission as an information resource and recommends the publication of good practices and examples on its website.

Both the Directive 2001/29 and the Commission Recommendation of 24 August 2006 emphasize contractual solutions that can be negotiated between stakeholders. The Copyright Subgroup has used this as a point of departure and has listed a number of measures that greatly reduce the problem of orphan works. It thus offers a toolbox of possible contributions to a solution to the issue.

In the sections that follow, each of the elements and recommendations will be dealt with more in depth.

5.2 THE DIFFERENT SOLUTIONS TO THE ORPHAN WORKS ISSUE

Clarification and transparency in the copyright status of a work is an important element in the European Digital Library initiative. Cultural institutions need adequate certainty in dealing with orphan works, and this principle is also included in the high level principles that govern the work of the Copyright Subgroup.

The following general prerequisites need to be fulfilled when considering the use of orphan works:

- A user wishes to make good faith use of a work with an unclear copyright status;
- Due diligence has been performed in trying to identify the rightholders and/or locate them;
- The user wishes to use the work in a clearly defined manner;
- The user has a duty to seek authority before exploiting the orphan work, unless a specific copyright exception applies.

Guidelines on “due diligence” need to be established, based on what is reasonable under the circumstances. In some countries regulatory and voluntary mechanisms for orphan works have been established. These can be tailored for orphan works, or designed for more general purposes.

A short summary of these solutions is given below¹⁶.

THE CANADIAN REGIME FOR NON LOCATABLE COPYRIGHT OWNERS

Pursuant to section 77 of the Canadian Copyright Act, the Copyright Board of Canada¹⁷ may grant licenses authorising the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owners cannot be located. The copyright owner is entitled to collect royalties within a deadline of five years from the expiry of a licence. The Board has decided to involve CMOs in the process. In general, the Canadian model allows works and other subject matter to be used where it is not possible to locate copyright owners. The fact that a licence is issued protects the licensee from subsequent prosecution.

OTHER REGIMES WHERE A PUBLIC BODY MAY ISSUE THE LICENSE

There are various regimes where a public body is empowered to issue a licence. In the following, some of them are briefly described:

- Copyright Tribunal: the UK (s. 190) and Fiji (s. 190) Acts provide that the Copyright Tribunal may consent to a person making a recording from a previous recording of a performance where the identity and whereabouts cannot be ascertained by reasonable inquiry.
- Government Body: The Japan Act (s.67) authorises the Commissioner of the Agency for Cultural Affairs to issue a compulsory license for the exploitation of a work that has been made publicly available if, after due diligence has been exercised, the copyright owner is unknown or cannot be found.
- Copyright Commission: In South Korea (s. 47 of the Act), the Minister of Culture, in practice the Copyright Commission for Deliberation and Conciliation, can issue a license for the exploitation of a work if, despite considerable efforts, the owner of the copyright cannot be located.

THE FRENCH MODEL FOR AUDIOVISUAL WORKS

The French National Audiovisual Institute (INA) has the task of preserving and exploiting audiovisual archives produced or co-produced by public television companies. INA has concluded general and collective agreement with representatives of various categories of rightholders through their CMO¹⁸ or the trade unions.

Under this regime, there is a collective management of the relevant authors' rights; this solution only concerns authors who have contributed their royalties on the works involved to the societies of authors that are signatories of these agreements with INA. Regarding the artists-performers, the agreements concluded by INA with trade unions authorise INA to exploit the presentations of "all" the performers on its archives' fund (subject to possible restrictions appearing in some employment contracts) for all modes of exploitation (even the one which didn't exist when their employment contracts have been signed). The French intellectual property code (Art. L122-9 and 211-12 for related rights) includes a provision for dealing with the risk of a blockage. The Act of 1 August 2006 also introduces a special provision connected to the exploitation by Ina of its archives including performances of artists-performers.¹⁹

POWER TO EXTEND THE APPLICATION OF A SCHEME OR LICENCE

The UK Act (s. 167 and 168) includes an implied indemnity in certain schemes and licences for reprographic copying which is valid "within the apparent scope of the licence". For reprographic copying in educational establishments in connection with teaching activities (s. 168), the Minister may by order provide that a licensing scheme or license shall extend also to works of such rightholders that the licence does not cover.

EXTENDED COLLECTIVE LICENCES

Since the early 1960s, Nordic Countries have applied a legislative technique to deal with certain complex usage situations. This legal technique, called "extended collective licence (ECL)²⁰", is a support mechanism for freely negotiated licensing agreements. During the years 2002 and 2006, the Nordic countries extended the ECL to cover certain activities in libraries, museums and archives. Whereas an ECL is not tailored for orphan works, to a large extent it can eliminate the issue of unknown or non-locatable rightholders in the designated area. In Denmark, a recent revision of the copyright law (January 2008) foresees an organisation to be

appointed to issue licences for orphan works under an ECL stipulation. The provision will enter in force on 1 July 2008.

HUNGARIAN PENDING LEGISLATION

The Hungarian copyright system has several different rules which can help the users in searching and finding the rightholders of the works. There is a functioning extended licensing system managed by CMOs and on the basis of that system the users can get licenses for the use of orphan works as well.

The Hungarian Government has proposed an amendment of the Copyright Act that will give more resolutions for the problem of orphan works. The proposed amendments are “to insert a new heading and Article 57A into the Copyright Act “Authorisation of use in case if the author or his/her location is unknown”. According to the proposal, a non-exclusive, non-transferable authorisation of use for at most 5 years at the request of the user could be given by the Hungarian Patent Office.

US PENDING LEGISLATION ON ORPHAN WORKS

In 2006, a draft bill was proposed by the Copyright Office, with a short title “The Orphan Works Act of 2006”. According to the bill, a user would be allowed to use an orphan work without an authorisation. The bill is based on the concept of limited liability (a “limits-on-remedy” system) whereby, once the threshold requirement of a reasonably diligent search to find a copyright owner is met, liability would be limited. – Legislation is pending. In April 2008, the US House and Senate versions of the Orphan Works Act of 2008 were made available. The proposal is based on the elements included in the 2006 draft bill, with enhanced proposals concerning identification of certain types of works with the help of databases among others.

5.3 THE EUROPEAN APPROACH: MUTUAL RECOGNITION OF NATIONAL SOLUTIONS

Taking into account that various alternative mechanisms exist to deal with the issue of orphan works, the Commission has recommended that Member States, in collaboration with stakeholders, establish mechanisms to facilitate the use of orphan works. Under this approach, interoperability and mutual recognition of existing solutions become an important issue, especially if the cross-border nature of the use is considered.

The Copyright Subgroup has suggested that in order to ascertain the interoperability between the Member States, common “diligent search” criteria for finding rightholders should be established. It has further recommended that Member States recognise solutions in other countries that fulfil “diligent search” criteria in order to achieve the cross-border effect. As a result, material whose rightholders are considered diligently searched for in one Member State would also be considered accordingly in another. The solution would be based on the concept of mutual recognition. Thus it is a prerequisite that all Member States have solutions which are interoperable and agree to mutually recognise any mechanism that fulfils the generally accepted core principles.

5.4 DILIGENT SEARCH GUIDELINES

Solutions in different Member States may be different, but they need all to fulfil certain commonly accepted core principles, such as:

- Cover all orphan works (those with unidentified or non locatable rightholders), on the basis of a shared definition;
- Include guidance on diligent search;
- Include provision for withdrawal if the rightholder reappears;
- Offer cultural, not-profit establishments a special treatment when fulfilling their dissemination purposes, to be further discussed between stakeholders;
- Include requirement for general remuneration or remuneration if the rightholder reappears.

The Copyright Subgroup suggested that the notion and conditions of “diligent search” in the context of orphan works need to be elaborated. The work would be based on the following parameters:

- Any solution for orphan works should be applicable to all kinds of protected works.
- The potential user of orphan works should be required to conduct a thorough search in good faith in the country of publication/production if applicable, with a view to identifying, locating and contacting the copyright owner, prior to the use of the work.
- A flexible approach should be adopted to ensure an adequate solution in dealing with individual circumstances of each orphan work, taking into account various categories of works.
- Guidelines or best practices specific to different kinds of work can be worked out by stakeholders in different fields.
- Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted, due to rapidly changing information sources and search techniques.

At the recommendation of the Copyright Subgroup, the Commission organised a meeting called “Stakeholders’ Perspectives” on 14 September 2007. It was the wish of the Copyright Subgroup to include representatives of different cultural sectors in deliberations on due diligence guidelines for their respective sector.

The following is a summary of the findings of the meeting:

- All representatives of stakeholders confirmed that “orphans” exist;
- Representatives of cultural institutions gave examples of concrete cases;
- The necessity of addressing the issue separately in each creative sector was emphasised by rightholders;
- It was acknowledged that legal certainty is important for cultural institutions.

The spirit of cooperation was eminent at the meeting and representatives of cultural institutions and rightholders were willing to engage in a constructive dialogue in order to establish due diligence guidelines for their respective sector.

As a follow-up to the deliberations at the Stakeholders’ Perspectives meeting, the Commission set out a plan for facilitating the creation of sector specific diligent search criteria. Such criteria could be a voluntary measure in a form of Industry Guidelines or Best Practices that European representatives of relevant industries and cultural institutions endorse. The main creative sectors working in accordance with the plan are: text, audiovisual, visual/photography and music/sound; consequently, four different Working Groups (WGs) were nominated to decide on the guidelines for their sector. The work on diligent search guidelines took place from October/November 2007 and is at its final stage. Endorsement is foreseen to begin on 4 June 2008, after the work is concluded.

The Copyright Subgroup has initiated the work and encourages it, but is not a participant in the sector specific groups. The work is thus a spin-off of the Copyright Subgroup. The WGs work independently and report on their work to the High Level Group and the Commission.

Diligent search guidelines on European level are by their nature generic (European). They will include a common understanding on information resources and the procedure to be followed. It will be important to “customise” the generic information resources locally and link national resources into a European-wide information pool. This will be particularly important as the country of origin of the work will normally be the place where the search will be initiated.

Spreading of good practices in the Member States, be they regulatory, voluntary or a combination of the two, is important for all dealing with orphan works. Some measures already exist and many more are under planning.

For instance, CMOs and other intermediaries can play an active role in finding out if the status of a work is orphan. They can for example search for missing authors by “advertising”; many CMOs already have such procedures. Other intermediaries, such as “Books in Print”, can play a similar role.

This recommendation of the Copyright Subgroup finds practical implementations in the ARROW project and in national contractual arrangements between CMOs and cultural institutions.

5.5 DATABASES AND RIGHTS CLEARANCE MECHANISMS

While due diligence guidelines are an important feature in facilitating the use of orphan works, they need to be supplemented by practical tools to serve the users.

The Copyright Subgroup concluded that databases and Rights Clearance Centres will be a useful part of the overall solution of orphan works. Aiming to ensure interoperability, enhance coordination efforts and facilitate a multilingual access point incorporating national and local initiatives, the Copyright Subgroup decided to develop a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works and Out-of-print Works.

5.6. MEASURES TO PREVENT FUTURE ORPHANS

A work becomes orphan just for one reason: information about it is missing. The best way to ensure that works do not become orphan is to address the creation, maintenance and accessibility of relevant information.

Different measures to improve the availability of information on works, rightholders and rights have been mentioned, among them the following:

- Use of electronic and other identifiers;
- Creation, use and maintenance of metadata in the digital files;
- Recognition of the value of standard identifiers.

Preventative measures also include enhanced contractual practices, in particular in the audiovisual field.

Follow-up and implementation of preventative measures are to a large extent a matter of private sector stakeholders. It could be an area where representatives of rightholders and cultural institutions have a joint interest. Cooperative efforts can bring a win-win solution for the future.

5.7 CONCLUSION

Both the Directive 2001/29 and the Commission Recommendation of 24 August 2006 put emphasis on contractual solutions that can be negotiated between stakeholders. The Copyright Subgroup has had this as its point of departure and has listed a number of measures that greatly reduce the problem of orphan works. It thus offers a toolbox of contributions to a solution to the issue. It is thus important to foresee a combination of measures.

Notes

¹⁴ This section is based on a draft originally prepared by Ms Tarja Koskinen-Olsson on the basis of inputs, discussions and comments by Ms Lynne Brindley and Mr Toby Bainton, Mr J.F. Debarnot, Ms Claudia Dillmann and Mr Olav Stokkmo.

¹⁵ Accessible Registries of Rights on Orphan Works (towards the European Digital Library (EDL)). For more detail see below, Section 10.3.

¹⁶ For a more extensive analysis see the 2006 Report.

¹⁷ <http://cb-cda.gc.ca/unlocatable/brochure-e.html>

¹⁸ SCAM, SACD, SACEM, SDRM, SESAM.

¹⁹ See also the comprehensive Report on Orphan works issued in March 2008 and now available at <http://www.culture.gouv.fr/culture/cspla/rapoeuvor08.pdf>

²⁰ Extended collective license, leaflet prepared by the Ministry of Education and Culture, Finland, June 1991.

ANNEX 2

http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf

Memorandum of Understanding on Diligent Search Guidelines for Orphan Works

In the framework of the European Digital Libraries Initiative, which aims to provide a common multi lingual access point to Europe's cultural heritage,

The Undersigned

- *Appreciating the importance of the European Digital Libraries ("EDL") initiative and of preservation of and access to European cultural heritage;*
- *Recognising that in particular older material may include works whose rightholders are not identifiable or, if they are identifiable, can no longer be located;*
- *Emphasising respect for copyright and related rights, economic and moral rights, regarding the use of orphan works;*
- *Emphasising the need for adequate certainty when cultural institutions deal with orphan works, with respect to their digitisation and online accessibility within the framework of the EDL;*
- *Considering that standards of due diligence can best be established in collaboration between stakeholders, i.e. representatives of rightholders and cultural institutions;*
- *Having actively engaged on a voluntary basis in defining generic due diligence guidelines as one practicable and flexible tool to facilitate the identification and location of rightholders for the lawful use of orphan works,*

Have agreed on the following:

1. That the due diligence guidelines (Joint Report and relevant Sector Report(s)) should be observed, to the extent applicable, when searching for rightholders 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 rightholders.
2. 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.
3. 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.
4. To invite the Commission to call upon the signatories to review the implementation of the guidelines after an appropriate period of time, such as one year.

Representatives of rightholders and cultural institutions:

- **ASSOCIATION DES CINEMATHEQUES EUROPEENNES (ACE)**, Audiovisual sector, Claudia Dillmann, 4 June 2008
- **ASSOCIATION OF EUROPEAN PERFORMERS' ORGANISATIONS (AEPO-ARTIS)**, Audiovisual and Music/Sound sectors, Xavier Blanc, 4 June 2008
- **BIBLIOTHEQUE NATIONALE DE FRANCE (BNF)**, Text sector, Bruno Racine, 4 June 2008

- **BRITISH LIBRARY (BL)**, Audiovisual, Music/Sound and Text sectors, Dame Lynne Brindley, 4 June 2008
- **BRITISH SCREEN ADVISORY COUNCIL (BSAC)**, Audiovisual sector, Fiona Clarke-Hackston, 4 June 2008
- **CONFERENCE OF EUROPEAN NATIONAL LIBRARIANS (CENL)**, Text sector, Elisabeth Niggemann, 4 June 2008
- **EUROPEAN BUREAU OF LIBRARIES, INFORMATION AND DOCUMENTATION ASSOCIATIONS (EBLIDA)**, Text sector, Andrew Cranfield, 4 June 2008
- **EUROPEAN FEDERATION OF JOURNALISTS (EFJ)**, Audiovisual, Text and Visual/Photography sectors, Marc Gruber, 4 June 2008
- **EUROPEAN FILM COMPANIES ALLIANCE (EFCA)**, Audiovisual sector, Laura Vilches on behalf of Kim Magnusson, 4 June 2008
- **EUROPEAN NEWSPAPERS PUBLISHERS' ASSOCIATION (ENPA)**, Text sector, Valdo Lehari jr., 4 June 2008
- **EUROPEAN VISUAL ARTISTS (EVA)**, Visual/Photography sector, Carola Streul, 4 June 2008
- **EUROPEAN WRITERS' CONGRESS (EWC)**, Text sector, Myriam Diocaretz, 4 June 2008
- **FEDERATION OF EUROPEAN PUBLISHERS (FEP)**, Text sector, Jonas Modig, 4 June 2008
- **FEDERATION EUROPEENNE DES ÉDITEURS DE PERIODIQUES (FAEP)**, Text sector, David J. Hanger, 4 June 2008
- **FEDERATION EUROPEENNE DES REALISATEURS DE L'AUDIOVISUEL (FERA)**, Audiovisual sector, Cécile Despringre, 4 June 2008
- **FEDERATION INTERNATIONALE DES ASSOCIATIONS DE PRODUCTEURS DE FILMS (FIAPF)**, Audiovisual sector, Benoît Ginistry, 4 June 2008
- **GROUPEMENT EUROPEEN DES SOCIETES D'AUTEURS ET COMPOSITEURS (GESAC)**, Music/Sound sector, Martine Rezzi, 4 June 2008
- **INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL AND MEDICAL PUBLISHERS (STM)**, Text sector, Michael A Mabe, 4 June 2008
- **INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS (ICMP/CIEM)**, Audiovisual, Music/Sound and Text sectors, Ger Hatton, 4 June 2008
- **INTERNATIONAL FEDERATION OF FILM DISTRIBUTORS (FIAD)**, Audiovisual sector, Marie-Andrée Vander Elst, 4 June 2008
- **INTERNATIONAL FEDERATION OF PHONOGRAPHIC INDUSTRY (IFPI)**, Music/Sound sector, Shira Pearlmuter, 4 June 2008
- **IFRRO THE INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS**, Text sector, Olav Stokkmo, 4 June 2008
- **PYRAMIDE EUROPE**, Visual/Photography sector, Martin Beckett, 4 June 2008
- **UK NATIONAL ARCHIVES**, Text sector, Natalie Ceeney, 4 June 2008

ANNEX 3

http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf

SECTOR-SPECIFIC GUIDELINES ON DUE DILIGENCE CRITERIA FOR ORPHAN WORKS

Joint Report

1. General matters

1.1. Context and goal of the guidelines

Context

As part of its overall strategy to boost the digital economy under the i2010 strategy, the European Commission launched the European Digital Libraries initiative in 2005 to provide a common multi-lingual access point to Europe's digital cultural heritage.

The Commission established a High Level Expert Group in February 2006 to advise it on organisational, legal and technical challenges and to contribute to a shared strategic vision for European digital libraries. The High Level Expert Group in turn set up a Copyright Subgroup to deal with copyright issues. The Copyright Subgroup has focused on the development of practical solutions for digital preservation, out of print works and orphan works. The Copyright Subgroup issued reports in October 2006 and April 2007.

The Copyright Subgroup recommends that Member States be encouraged to establish mechanisms to enable the use of orphan works against agreed terms and remuneration, if applicable, provided diligent search to identify and locate the rightholders had been performed prior to the use of the works. The April 2007 report recommends that sector specific guidelines for diligent search be developed by stakeholders.

At the initiative of the Copyright Subgroup, the Commission organised a Stakeholder Conference on September 14, 2007 to which relevant stakeholders of different sectors had been invited. The participants of the Stakeholder Conference confirmed that orphan works were a problem in all creative sectors although its scope and amplitude varied from one sector to another. They concluded that there was a need for guidelines for diligent search for rightholders in different creative sectors and confirmed their willingness to participate in such work. It was recognised that there would be some issues affecting more than one sector ("cross sector issues").

Sector Specific Working Groups

The Commission followed the conclusion from the Stakeholder Conference and invited representatives from cultural institutions and the creative sectors to take part in four sector specific working groups ("WGs") (text, audiovisual, visual/photography and music/sound) with the mandate to develop such guidelines for their respective sectors. The goal was to

create a set of guidelines for cultural institutions seeking to find rightholders of works that might be orphan.

The WGs report to the Commission and the High Level Expert Group. The WGs are composed of representatives of rightholders and cultural institutions of their respective sector and have one or two chairpersons each. An overall coordinator (Tarja Koskinen-Olsson, member of the High Level Expert Group and the Copyright Subgroup, assisted by Franziska Schulze of IFRRO) is tasked to ensure the cohesiveness of the guidelines.

The WGs met at three joint meetings from October 2007 to April 2008. In the meantime each WG has worked independently. They each delivered a report containing their sector guidelines. The reports also include other proposals and findings for their respective sectors which should be useful reading for those developing solutions to orphan works in this context.

Goal

In its recommendation of 24 August 2006¹ the Commission recommended Member States “*improve conditions for digitisation of, and online accessibility to, cultural material by creating mechanisms to facilitate the use of orphan works, following consultation of interested parties*”². Work on the European level is designed to give guidance to national measures to implement the recommendation.

The due diligence guidelines assist in identifying and locating rightholders and are thus an important and necessary part of this work. As a voluntary measure they do not as such solve all issues relating to orphan works. The guidelines are not meant to address issues such as the design, applicability or conditions of licensing or rights clearance mechanisms.

The guidelines at the European level need to be generic because of the diversity of potential solutions and resources at the national level. The guidelines are a practical tool, designed to assist in identifying and locating rightholders; the actions and lists of resources they contain are not prescriptive and they do not contain any normative statements as to whether any particular stakeholders should hold rights. The guidelines foresee that diligent search would generally use the resources of the country of origin of the work (if known) and be carried out on a title by title basis, based on available data. Users of the guidelines are expected to check those resources which are appropriate for the orphan work in question.

While it is recognised that non European material is of importance to cultural institutions, these guidelines were drafted for the particular needs of European material. Case studies of measures taken in Member States exist at this stage from the text and visual/photography sectors and they are to be published separately (and updated/complemented); further case studies may be added in due course, also for other sectors. Member States and national stakeholders may take inspiration from these case studies when developing national solutions.

¹ Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC), OJ 31/08/2006, L 236/28

² Ibid, 6(a)

The Joint Report is based on the Sector Reports submitted by the WGs (annexed). It is envisaged that representatives of the different creative sectors and cultural institutions endorse the guidelines (the Joint Report and their respective Sector Report(s)).

1.2. The definition of an orphan work

The below definition should be read bearing in mind these clarifications:

- Orphan works are by definition works in which copyright still subsists.
- “Works” should be understood as a short hand for works protected by copyright (including economic as well as moral rights) as well as subject matter protected by related rights such as performances, films, sound recordings, broadcasts and databases. The following will refer to all of these works and other subject matter as “works”.
- “Rightholders” should be understood as a short hand to identify all those persons who may have rights in any given work. The term includes the authors (i.e. of those who created the work), performers, publishers (music or text), producers or broadcasters. It also encompasses their respective successors in title.
- The use of a work or material consisting of several works can require permission of several different rightholders and the orphan status should be ascertained with regard to each.
- Anonymous / Pseudonymous works are not automatically orphan works.
- Not included are works whose rightholders refuse to authorise a use or who do not reply to a request for permission.

Each Sector Report includes a definition elaborated for the purposes of its specific sector (for the definition of each sector, please see the annex):

TEXT “*An orphan work is a work protected by copyright but the current owner is unknown or untraceable by diligent search. The current owner of the copyright might be the author or other creator, some other first owner if the rights (such as the author’s employer -when applicable) or a publisher) or any right holder who is presumed to be the right holder according to the legislation or contractual agreement or any successor of the first owner.*”

MUSIC/SOUND: “*An orphan work is a protected work or other subject matter whose author and/or rights holders could not be identified or found, in spite of good faith, reasonable efforts to do so in compliance with due diligence rules, to be defined by the Working Group.*”

VISUAL/PHOTOGRAPHY: “*Neither the Rightholder nor the author/creator nor their respective successors can be traced; unknown authors / creators; anonymous / pseudonymous works are not orphans – often dealt with in national legislation.*”

AUDIOVISUAL: “*An audiovisual work is defined as “orphan” only when the copyright owner/right holder(s) either cannot be identified at all or when his name is known but he cannot be located in order to obtain authorisation. As such, an “orphan audiovisual work” is defined as a work the copyright owner/rightholders of which cannot be identified after a diligent good faith search using generally accepted search methods and tools. Even if the copyright owner/rightholders can be identified, the work will still qualify as orphan if the identified copyright owner/rightholders cannot be located after a similarly diligent good faith search*”

For the purposes of the present guidelines rather than as a blue print for legislation, an “orphan work” is defined as follows:

A work is “orphan” with respect to rightholders whose permission is required to use it and who can either not be identified, or located based on diligent search on the basis of due

diligence guidelines. This search must be both in good faith (subjectively) and reasonable in light of the type of rightholder (objectively).

2. Due diligence criteria

2.1 Procedure

Main Principles for identifying and/or locating the rightholder:

- The search is done prior to the use of the work
- The search is done title by title or work by work
- The relevant resources would usually be those of the country of the work's origin

The search should follow proper procedure in line with the applicable guidelines:

The procedure and methodology of the search and further matters of orphan works is to be established by the cultural institution in compliance with the applicable guidelines. Similar cultural institutions are encouraged to cooperate and publish search procedures and methodologies.

Publishing an announcement may be part of the procedure, for example using these media:

- On a web-site
- In a relevant publication (trade, professional etc)
- In social or professional networks or associations (including newsletters)
- In the local or national press

The search process should be documented:

- Date of the searches
- Names of the resources used and list of search terms employed
- Copies of announcements where relevant

The active search would use the appropriate resources listed under 2.2.

A statement that rightholders could not be traced (including such information on the rightholder(s) as available and appropriate) is considered good practice. An example for an individual work might be “work still in copyright, rightholder could not be traced, *name of cultural institution+”. Such a statement may be recorded at the level of an individual work or at collection level and should be recorded in any information or collections management system used by the institution.

Material consisting of several works (whether including “embedded works” or based on “underlying works”), should be searched first on the basis of the guidelines in the sector of the ‘main material’ and where the rightholders of these works cannot thereby be identified and/or located, the guidelines for the sector of the embedded and/or underlying work must also be followed.

2.2. Resources available for research, common and per subcategory:

The relevant resources would usually be those of the country of the work's origin. The resources should either be publicly available or held by an organisation that is willing to share the information needed at no or low cost.

Common resources for all sectors to identify and/or locate the rightholder(s), as feasible:

- Check the European Digital Library whether the work has already been digitised, including cooperation between similar cultural institutions
- Check files/sources on provenance
- Credits and other title/work/rightholder information appearing on the work's cover, packaging or otherwise (including names, titles, date and place of recording, publishing)
- Information held in receipts, registers, files, collections management systems and other information held by the institution
- Following up of these leads to find additional right holders (e.g., contacting a record producer to find the performers)
- Collective rights management organisations for the relevant sector and their databases
- Relevant associations or institutions representing the relevant category of right holder(s) (including unions, trade associations, their members and their databases and membership lists).
- General databases on rightholders and/or works, such as the WATCH database – www.watch-file.com
- Online copyright registration lists (including those maintained by government agencies such as the U.S. Copyright Office)
- The legal deposit/national library or archive, or other documentation centres
- Relevant personal and/or business directories and search engine searches
- The national bibliography or material relevant for the subject matter and published indexes of published material
- Published indexes and catalogues from library holdings and collections
- Published biographical resources for authors
- Published sources on the history of relevant legal bodies (such as publishers or producers having issued the work)
- Legal sources such as company house records or industry specific records/databases on change of ownership of the legal person or publication or their insolvency/winding up
- Contact other owners of the same or similar works by same author/creator
- Agencies administering relevant standards and identifiers (inter alia ISBN for books, ISSN for periodical publications, ISAN for audiovisual material, ISMN for sheet music, ISWC for musical works, ISRC for sound recordings etc.)³ and their databases
- Additional publicly available sources depending on the country and the works in question such as probate records (to trace authors' heirs)

³ ISBN: international standard book number, ISAN: international standard audiovisual number, ISMN: international standard music number, ISSN: international standard serial number, ISWC: international standard music work code, ISRC: International Sound Recording Code.

Examples of resources specific to certain subject matter

Books

- Public Lending Right authority databases where available
- Lists of books in print

Journals

Please refer to the Safe Harbour Provisions for the Use of Orphan Works for Scientific, Technical and Medical Literature by STM/ALPSP/PSP.⁴

Sheet music

- Websites listing music publishers & sheet music available in the respective countries
- Published sources on the history of relevant music & lyrics writing, such as lyrics in print

⁴ <http://www.stm-assoc.org/home/stm-alpsp-psp-issue-clear-rules-for-orphan-works.html>.