

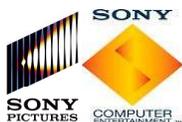


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CreativeMediaBusinessAlliance

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Position Paper on Orphan Works

The Creative and Media Business Alliance (CMBA) is an informal group gathering Europe's top media and creative businesses and industry associations. It was launched in November 2004 to give its members a strong and united voice at the level of the European Union.

CMBA members are aware that the European Commission is currently working on a legislative initiative on orphan works. The sectors represented by CMBA members are directly concerned with this issue. Publishers, broadcasters, producers and distributors, together with their authors and other creative and financial contributors, are the ones generating and disseminating cultural and scientific works.

Right holders are keen supporters of the EU's goal to promote the digitisation of cultural and scientific works in order to preserve Europe's heritage, to the benefit of European citizens. The CMBA notes that any policy consideration on encouraging the making available of content online by cultural institutions must carefully distinguish between **digitisation for preservation purposes and the making available online of digitised copyright works**. The issue we are addressing is the latter.

Digitisation of copyright works for preservation purposes is a main function of many public and national museums and archives, and is also vitally important for society at large. As for the making available of those works online, this needs to be done taking into account the interests of all stakeholders, and be carried out in accordance with applicable laws which stipulates that right holders should always be able to decide whether or not to grant permission for use of their work. The making available online of copyright works by cultural institutions thus requires prior authorization by right holders in order to determine in particular whether or not such making available would interfere with the commercial exploitation of the works concerned. CMBA members understand, however, that there will be circumstances in which right holders cannot be identified and/or located, and that there is a public interest in the ability of these institutions to be able to make use of the works in appropriate circumstances.

In our view, the most pragmatic approach to the orphan works issue is the one already recommended by the High Level Expert Group

(HLEG) on Digital Libraries, which builds on the idea of mechanisms in each Member State **based on a due diligence search and mutual recognition of national solutions**. This approach will allow each Member State to develop the most appropriate solution in accordance with its legal tradition, minimising red tape and unnecessary legislative burdens. Such national solutions could be implemented consistently with the EU 2001/29 Copyright Directive.

1. Identification of the status of the work through diligent search

Prior to the digitization and making available online of a presumed orphan work, cultural institutions need to establish whether the work in question is actually orphan. CMBA members insist that any legislative initiative addressing orphan works must be based on a **due diligence search in the country of origin of the work** (when it is known) **before the digitisation and/or making available of the work**. The due diligent search should be carried out on a title-by-title basis, based on available data.

Under the aegis of the European Commission, a *Memorandum of Understanding on Diligent Search Guidelines for Orphan Works*⁽¹⁾(MoU) was signed in 2008 by 27 signatories including libraries, archives, audiovisual archives, and right holders in the presence of Commissioner Viviane Reding.

Following the work of the HLEG to develop tools to facilitate accessibility of works, the signatories agreed in the MoU that due diligence search guidelines “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” (2).

Stakeholders “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 right-holders for the lawful use of orphan works”⁽³⁾. The result of their work is enclosed in the annexed *joint report on sector specific guidelines*⁽⁴⁾ as well as sector specific reports⁽⁵⁾. Signatories agreed in the MoU “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”⁽⁶⁾.

The need to conduct a diligent search in the country of publication prior to the digitization and the making available of the work was the criteria underpinning the work achieved in this group and should therefore remain the basis of any discussions and/or legislative initiatives on orphan works⁽⁷⁾. This is particularly the case since the reproduction and/or making available of copyright works without the authorisation of the relevant right holders must take place in a manner consistent with national, European and international copyright norms. Moreover, diligent search presents practical and cost-related advantages as it helps avoid the digitisation of works that have already been digitised by other institutions. Conducting the search prior to the

digitisation also serves to help prevent situations where a work wrongly considered orphan is digitised and then one of the parents (i.e. an identifiable right holder) asks to have the work in question removed. Consequently, once the author is identified, it would be possible to seek permission for the making available of his/her work.

A risk-based approach allowing cultural institutions and commercial players to digitise and make available online works simply on the basis of their own belief or assessment that the works are orphan, albeit with a possibility for right holders to withdraw their work or receive an equitable remuneration, would be incompatible with EU and international copyright law. Any approach which diminishes exclusive rights in such a manner is inconsistent with EU and international copyright norms. Moreover, such an approach would create legal uncertainty and would impede the realisation of the objectives of any European legislative intervention.

On the contrary, the legal certainty resulting from diligent searches will encourage archives, museums and libraries to digitise their collections, rather than stifle their efforts to make digitised works available online. By ensuring that cultural institutions are not digitising and making works available that are actually not orphan, they will be incentivised to digitise works without running a major risk of reappearing parents. Moreover, right holders will not have to monitor the internet on a world-wide basis to make sure that none of their works have been presumed orphan, digitised and made available online without their permission. The resources gained by performing a diligent search could then be used to build public-private partnerships between stakeholders with a view to increasing the amount of digitised works which can be made available online by cultural institutions.

The print sector has already made considerable efforts to facilitate the identification of rightsholders and print works, including orphan works. A consortium of European National libraries, book publishers and reproduction rights organisations (RROs) including authors have worked together to develop a eContentPlus project ARROW (Accessible Registries Rights Information and Orphan Works towards Europeana). Arrow facilitates access to best rights information available from a predefined set of sources, to determine the rights' status of book to be digitised and made available online, and to eventually redirect libraries to the relevant clearing rights centres or to individual contacts. At a long term, ARROW aims to create an infrastructure to exchange rights information at EU level, based on open standards.

This way, diligent search will support public-private partnerships by assuring public and private entities that the digitisation of the works they are financing will not be undermined by having right holders asking for its subsequent withdrawal and damages.

2. An adapted solution through a sector-specific approach

It is the view of the members of the CMBA that the need for a legislative instrument has not been sufficiently demonstrated with respect to all types of content.

Although libraries and archives have argued that orphan works are a problem in all creative sectors, its scope and amplitude vary from one sector to another. Thus, the legislative approach to the orphan works issue must also be sector-specific and be underpinned by detailed impact assessment analysis, including an empirical demonstration of the problems that require solutions.

The participants of the Stakeholder Conference organised by the Commission on 14 September 2007 recognised the need for sector-specific guidelines. This need was acknowledged by the Commission, which invited representatives from cultural institutions and the creative sectors to take part in four sector-specific working groups (text, audiovisual, visual/photography and music/sound). Those groups drafted the *Joint Report on sector specific guidelines*(8) as well as sector-specific reports(9) annexed to the MoU, as also mentioned above. Following this rationale, CMBA members recommend that in order to find adequate solutions, a thorough impact assessment should be conducted for each sector before proceeding with any action.

To preserve and protect cultural heritage, we continue to believe that voluntary agreements and public-private partnerships are the way forward. Should a public sector archive/library wish to provide access to copyright content online, it should do so through licensing arrangements with right holders in the same way as is common practice for physical content, and always in a manner that does not interfere with the normal exploitation of the work by the right holders, as foreseen by European and international law.

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

(2) Ibid.

(3) Ibid.

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

(5) http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/appendix.pdf

(6) Op. cit. 1

(7) The signatories agreed in the MoU that they 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. So far 2 years later, this review has not yet taken place.

(8) Op. cit. 4

(9) Op. cit. 5