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The Problem of Orphan Works in the EU

**An overview of legislative solutions
and main actions in this field**

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Abbreviations

CMO	Collective Management Organisation
ECL	Extended Collective Licensing
HLG	High Level Expert Group on Digital Libraries
IViR	Institute for Information Law, University of Amsterdam
MSEG	Member States Expert Group on Digitisation and Digital Preservation
MS	Member States
OW	Orphan Work
UK	United Kingdom
US	United States

Introduction

Digital and web-based information technology and media give the public new possibilities of exploiting cultural material. Works existing in analogue form can now be easily digitised and therefore reused for different purposes and by different users. Industries, such as publishers, producers, broadcasters or information service providers are taking advantage of information technology by reusing analogue material in different ways. For instance, analogue material can be republished on the Internet websites, released on DVD or new compilations of old material can be produced. Also different cultural institutions can take advantage of the new opportunities opened up by digital technology. Museums, archives and libraries are involved in the digitisation of their collections of cultural and scientific material. In the case of the activities carried out by cultural institutions, the purpose of digitisation is often not only to preserve cultural and scientific material but also to provide users with access to their resources, including access online. To promote digitisation, online accessibility and preservation of digital material of cultural institutions, the European Commission launched the "i2010: Digital Libraries" programme¹ in September 2005.

Before digitising and further reutilising material that is still in copyright, the prospective user must often obtain consent from the copyright owner. The problem appears when it is impossible to find or locate right holders or when right holders remain unknown. This is the problem of so called 'orphan works'. Where it is impossible to get suitable permission from the owner, digitisation and further exploitation of the material might not take place. Such a situation is to the detriment not only of the user, but generally speaking, of the public, as no-one profits from cultural material left unexploited due to its orphan status.

Discussions on how to deal with orphan works are currently being undertaken by stakeholders and cultural and collective management institutions at different levels and scopes. Some of them have been initiated by the stakeholders themselves, others by the European Commission or by Member States. Generally speaking, the aim of these discussions is to find a solution to facilitate the use of orphan material without prejudice to copyright. The eventual solution should provide legal certainty both to users and right holders, should the right holders reappear after the use of orphan works was made without their explicit consent.

The objective of this report is to give a general overview of the situation of orphan works in the European Union. The report describes possible legislative solutions to the issue, as well as main actions that are currently underway in this field.

Chapter I, 'Background', presents the nature and scope of the problem and describes existing and proposed legislative solutions both in Europe and abroad. It also focuses on the key issues, underlining the cross-border nature of the problem.

The second chapter concerns actions undertaken by the European Commission in relation to the issue of orphan works. First of all, it summarises the Commission Recommendation² and Council conclusions³ on digitisation and online accessibility in relation to the orphan works' issue. Secondly, it presents the work of the High Level Expert Group on Digital Libraries and its subgroup dealing with copyright related issues within the digital libraries framework. Finally, it describes ongoing actions undertaken by institutions and stakeholders at the initiative of the European Commission.

¹ Commission Communication COM (2005) 465 final. To see the full text of the Communication: http://ec.europa.eu/information_society/activities/digital_libraries/doc/communication/en_comm_digital_libraries.pdf, see also http://ec.europa.eu/information_society/activities/digital_libraries/what_is_dli/index_en.htm

² Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, L 326/28 of 31 August 2006, 2006/585/EC.

³ Council Conclusions on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, 2006/C 297/01.

Chapter III presents voluntary actions undertaken independently by some institutions and stakeholders. First of all, it describes current practices of institutions and mechanisms that are already working in practice. Then, solutions supported by different stakeholders are presented. Finally, it gives examples of more recent actions undertaken by institutions and stakeholders at their own initiative that are still under way.

The fourth chapter is about the approach of Member States to the orphan works problem. The chapter presents actions, if any, that have been undertaken by Member States in order to introduce mechanisms or measures to facilitate the exploitation of orphan works in their respective countries in response to the Commission Recommendation and Council conclusions. Also the main arguments of Member States are quoted, where applicable.

The last part of the report contains a set of conclusions that can be drawn at this stage and possible follow-up on this issue.

I. Background

The first Chapter provides information on how the issue of orphan works has been dealt with till now. Having presented the nature and complexity of this problem, it describes existing and proposed legislative solutions both in Europe and abroad. Finally, it shows its specificity and underlines key issues of the problem.

1. Nature and scope of the problem of orphan works

An orphan work is a work in copyright (or other material protected by copyright) whose right holders (or at least one of the right holders) remain unidentified or untraceable making it impossible to get consent for using the work. Without such permission, digitisation and further exploitation of the work, including providing an online access to it, may not be possible. On a large scale this could obstruct the digitisation process provided by cultural institutions and consequently make impossible the use of the work by the public for different purposes.

Usually the problem with finding and locating right holders appears when cultural institutions want to digitise old works or give the potential user access to them. Due to the fact that copyright protection lasts 70 years after the death of the author⁴, it means that lots of works created in the first part of the 20th century still can be protected under copyright law. Problems, while dealing with such old material, vary in nature. It is not always a question of finding the right holder(s) or his successor(s). Due to the complexity of European history, changes of borders and law, collapses and fusions of companies, difficulties can consist in finding the proper contract or any relevant information about subsequent assignments of rights. In consequence, it is hard to find out whether or not there still exist any rights in relation to a given material and who is the right holder of such rights. Problems also occur when establishing which law would be applicable in the case of a lack of contract or a conflict of law provision. Besides, in different sectors problems related to orphan works differ. For instance: in the text/print sector, rights accreditation, management and databases are well developed; in the photography sector, this is not necessarily the case. Another example is audio-visual works, where unclear contractual relationships between right holders pose an additional challenge. It should happen that even if the producer of an audiovisual work is known and locatable, he may not be in a position to grant the necessary consent for all the rights and related rights involved that would provide legal certainty for the user. That is why a solution on how to deal with orphan works should be found, a solution which takes into consideration specific problems and categories of orphan works in particular sectors.

The *Directive on the harmonisation of certain aspects of copyright and related rights in the information society* (Copyright Directive)⁵ does not foresee any explicit mechanism, *i.e.* limitation or exception to copyright, aimed at facilitating the use of orphan works. For the moment, countries can only introduce exceptions under which cultural institutions can digitise protected material for non-commercial use and mainly for preservation purposes. Some cultural institutions are already conducting digitisation of cultural material in general, including orphan material, for preservation purposes. As costs of digitisation are very expensive, it would be regrettable that orphan material, once digitised, could not be made available to the public.

⁴ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, Official Journal L 372 of 27/12/2006, p. 12 (Copyright Term Directive).

⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167 of 22/06/2001, p. 10.

Also the *Directive on the term of protection of copyright and certain related rights* (Copyright Term Directive) does not specifically address orphan works. However, the latter deals with anonymous and pseudonymous works, providing for these works the term of protection of 70 years from creation (if unpublished) or from publication of the work (instead of life of the author + 70 years), unless the pseudonym leaves no doubt as to the author's identity. National implementation of this provision may provide some assistance in dealing with works whose authorship cannot be established because of their anonymous or pseudonymous character, as it provides for a clear copyright expiry date not dependent on enquires about the authors' identity, whereabouts or death date. One example can be Finnish law, which provides that in the case where the right holder is unknown, the term of protection runs for 70 years from the date of creation. This can significantly shorten the duration of protection.⁶

Although it is difficult to estimate the number of orphan works, the cultural institutions consider this a serious problem. For instance, the British Library estimates that "*over 40 percent of all in-copyright works are Orphan Works*".⁷ According to the survey carried out by Association des Cinémathèques Européennes (ACE)⁸, approximately 50,000 of the surveyed works were considered as orphan⁹. Both estimations, despite their general character and, in the case of ACE's survey – its limited scope (only to the audio-visual sector), clearly show that the problem is real and important.

According to the ACE survey:

- approximately 50,000 of the surveyed works are considered as orphan
- orphan works: mostly non-fiction and pre 1945/50
- approximately 2500 requests received per year to use orphan material
- aim of requests: broadcasting, cultural purposes, commercial use

2. Existing and proposed legislative solutions to the problem

In general, two legislative solutions enabling the use of orphan works have been practiced so far. One of them is the extended collective licensing (ECL) system, the other one is a model based on a non-exclusive licence. Apart from this, two other solutions have recently been worked out but are still in the form of proposal. Both of them consist in introducing a new limitation or exception to copyright or to copyright liability.

The following part of this chapter describes the above-mentioned solutions and proposals.

2.1. Extended collective licensing system

The system of extended collective licensing is applied in the Nordic countries (*i.e.* in Denmark, Finland, Sweden, Norway and Iceland) and in Hungary. The system consists of a voluntary transfer of rights from the right holders to a collective society and a legal extension of the repertoire of the society to encompass the right holders that are not members of the society. Consequently, extended licence applies to:

⁶ Art. 44 of the Finnish Copyright Law

⁷ <http://www.eblida.org/uploads/eblida/1/1193909947.pdf>

⁸ http://ec.europa.eu/information_society/activities/digital_libraries/doc/seminar_14_september_2007/ace_perspective.ppt

⁹ In 2005 ACE asked its members about the amount of orphan works they had in their archives. The attempt to locate the right holders was made only in relation to the material, for use of which the request was done. It means that in total the amount of orphan works is bigger.

- all right holders in the field (either domestic or foreign)
- deceased right holders
- unknown or untraceable right holders

Under this system, the user can obtain a licence to use orphan works without the risk of being sued for infringing rights of right holders who are unknown or untraceable (in case they reappear one day). However, there is normally the possibility for right holders not represented by the collective management organisation to opt-out of the licence.

The Copyright Directive (in point 18 of its Preamble) leaves Member States the possibility to introduce provisions concerning management of rights.

Point 18 of the Preamble of the Copyright Directive:

"This Directive is without prejudice to arrangements in the Member States concerning the management of rights such as extended collective licences."

2.2. Model based on centrally-granted non-exclusive licence

This model does not apply in Europe yet. The most characteristic legislation can be found in Canada. Somewhat similar provisions exist in UK legislation (with a relatively small scope) and in the Far East. Also, similar provisions are being drafted in Hungary.

Canadian model¹⁰

The Canadian Copyright law makes provisions concerning the use of orphan works¹¹. According to these provisions, in case a prospective user cannot find the right owner by reasonable inquiry, he/she has to apply to an administrative body – the Copyright Board, in order to obtain a licence. Such a licence enables him to use a particular orphan work. This system does not require any explicit consent of the copyright owner.

Before the licence may be issued, the applicant has to make a "reasonable effort" in order to find the copyright owner and has to provide evidence of it before the Copyright Board. With one application the applicant may request a licence for multiple orphan works. The purpose of the requested licence is irrelevant.

The tasks of the Copyright Board are to:

- advise the user where to check relevant information
- verify good faith of the applicant
- work together with other entities¹² in order to examine the application, advise on fees, terms of conditions
- grant a licence

The licence is non-exclusive, is issued on a case-by-case examination, it applies to works of both domestic and foreign origin and is limited to the territory of Canada. It works only for published works and sound recordings, fixed communication signals and performances, which respects the moral right of the author to decide whether or not to make his work available to the public.

The Copyright Board issue a licence under specific terms and conditions, stipulating type of use, restrictions, date of expiry, etc. The user has to pay a royalty fee, which usually

¹⁰ S. van Gompel, "Unlocking the Potential of Pre-Existing Content: How to Adress the Issue of Orphan Works in Europe?", 38 IIC 6/2007. p. 669-693.

¹¹ Art 77-78 of the Canadian Copyright Act, see Annex 2 to this Report.

¹² Such as CANCAPY, COPIBEC.

corresponds to an ordinary royalty rate, and which is either collected by a collective society or deposited.

In the case where the right holder reappears, he/she can collect the fee. In default of payment, the right holder can bring an action to recover it before a court of justice. If the right holder does not reappear until 5 years after the expiration of the licence, the money can be used for other purposes.

In general, the Canadian system provides a legal certainty for the user while keeping the legitimate interests of right holders. There are, though, some disadvantages of this system. First, the pre-clearance of rights is a rather expensive and long process. Secondly, taking into consideration that the Canadian system has been functioning since 1989, there has been a relatively small number of applications – less than 300 which resulted in 216 licences until November 2007 (of which, however, just 25 in 2007)¹³. Finally, the licence is not applicable to all types of works (for use of unpublished works the licence cannot be issued) and applies only to the Canadian territory.

Number of licences issued by the Copyright Board in Canada

1990-1996 – up to 9 licences per year	average = 4 per year
1997-2004 – up to 19 licences per year	average = 15 per year
2004-2007 – up to 26 licences per year	average = 23 per year

Similar systems in other countries¹⁴

Apart from Canada, the system of issuing a licence by a public body also exists in some other countries in the world. The purpose of the license is to authorise the exploitation of the work. This is the case in the UK, Fiji, India, Japan and South Korea. These regimes are based on a case-by-case analysis of the situation:

- in South Korea (s. 47 of the Act), the Minister of Culture (in practice, the Copyright Commission for Deliberation and Conciliation) can issue a licence for the exploitation of a work if, despite considerable efforts, the owner of the copyright cannot be located.
- the Japanese Act (s. 67) authorises the Commissioner of the Agency for Cultural Affairs to issue a licence for the exploitation of a work that was made publicly available beforehand if, after exercising due diligence, the copyright owner is unknown or cannot be found.
- the UK and Fijian Acts (s. 190) 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 of a performer cannot be ascertained by reasonable inquiry.¹⁵
- the Indian Act (s. 31A) provides that the Copyright Board can issue a license to publish an unpublished Indian work if the author is unknown or cannot be traced, or the owner of the copyright cannot be found.

¹³ See the website of the Copyright Board of Canada, Commission du droit d'auteur Canada, <http://www.cb-cda.gc.ca/unlocatable/licences-e.html>

¹⁴ See Annex I to the Interim Report of the Copyright Subgroup of HLG, 16 October 2006: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/interim_report_16_10_06.pdf

¹⁵ Besides, under s. 168 of the UK law, the Minister may by order provide that the licensing scheme or licence shall extend to works of right holders that the licence does not cover. Under this regime, there exists an extension effect to a licensing scheme, but not automatically. This mechanism exists only in relation to licenses for educational establishments for the purpose of reprographic copying in connection with teaching activities. In respect of the Digital Library Initiative, a licensee or a licensor could ask for a general license to be extended to cover orphan works.

Hungary

New provisions introducing a system based on authorisation or non-exclusive licence have recently been proposed in Hungary. A more detailed description is presented in chapter IV of this report.

Finland

In Finland, a draft bill concerning the implementation of the Copyright Directive, issued in 2002, included an orphan works-tailored proposal. The proposal was based on a depository regime where a CMO approved by a government body would have the possibility to grant a non-exclusive license to use works of unknown or non locatable right holders. The draft further specified that the government body could appoint one or several CMOs to perform this task. However, this proposal was not included in the Government Bill of 2004, and thus is not part of the present legislation.

2.3. Model based on limitation or exception to copyrights

Two models based on limitation to copyrights have recently been worked out. One of them is a proposal for a statutory exception or limitation to copyright in the UK. The second one is a concept of limitation-on-remedy rule, developed in the US.

Statutory exception or limitation to copyrights, BSAC proposal

In 2006, in the paper prepared for the Gowers Review of Intellectual Property¹⁶, the British Screen Advisory Council (BSAC) drafted a proposal¹⁷ for orphan works in the UK. The legal solution consisted in introducing a new, statutory exception or limitation to copyright.¹⁸ Adopting this solution to the Copyright law would, however, require changing the European copyright legislation as such limitation would be incompatible with the Copyright Directive: the Directive lays down an exhaustive list of (optional) limitations and exceptions to copyright.

With this solution, there would be no need to issue a licence. This statutory exception should be coupled with an obligation to reimburse right owners who emerge after the use of an orphan work has begun. The exception would apply to all kinds of orphan works, even unpublished, and it would not affect moral rights. The Gowers Review suggests that *"the UK Patent Office should establish a voluntary register of copyright, either on its own or through a partnership with database holders"*.

The user should use his 'best endeavours' to locate the right owner. The guidelines for the 'best endeavours' still need to be worked out. If it is not possible to find the right holder, the user can use the work under an exception provided that the work is marked as used under the exception. According to the BSAC proposal, *"disputes about the search for the copyright owner should be resolved by the courts, but the user of an orphan work should be required to supply the copyright owner with information about the search he has undertaken"*.

Under this proposal, if the right holder reappears he could claim "reasonable royalty" rather than sue the user for infringement. The amount of the royalty, as well as the terms and

¹⁶ See Gowers Review of Intellectual Property, December 2006

http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf

¹⁷ "Copyright and orphan works", paper prepared by the British Screen Advisory Council, 31 August 2006, for the Gowers Review of Intellectual Property (December 2006). See full text of BSAC proposal: <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>

¹⁸ See: Stef van Gompel, "Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?", 38 IIC 6/2007. p. 669-693 and Gowers Review of Intellectual Property.

conditions of further use, should be negotiated. If this is not possible, it would be for the UK Copyright Tribunal to establish the amount of money to be paid. If the work has been integrated or transformed into a derivative work, the user should be allowed to continue using this work provided that the royalty is paid and acknowledgement is given to the right owner. The right holders could be directly entitled to compensation for use (without the need to sue the user before the court of justice). The proceedings before the court should take place only if the user did not pay compensation or the right holder contests that the search made by the user is reasonable.

Limitation-on-remedy rule¹⁹

In January 2006, the US Copyright Office issued the “Report on orphan works” with a proposition to introduce a limitation-on-remedy rule. The consequence of this report was two bills, the Orphan Works Act (H.R. 5439) and the Copyright Modernization Act²⁰ (H.R. 6052), which incorporated a revised version of the previous one. These bills were introduced in the US House of Representative but in September 2006 they were taken off the agenda. As a result, the legislation will not take place until the proposal is tabled again by the 110th Congress.

The limitation-on-remedy rule means that there is a limitation of liability for those who use an orphan work after an unsuccessful but reasonable search for the right owners. This solution does not require issuing any licence.

Contrary to the Canadian model, the American solution would apply for all kinds of orphan works, even those unpublished and without any terms and conditions for the use of orphan works.

With this model, a *bona fide* user is required to prove that he has performed a reasonably diligent search in order to provide attribution to the author or right owner of the work. Although there is no definition of the 'reasonably diligent search' (which may cause uncertainty for the user), the user is obliged to at least:

- review information maintained by the Register of Copyrights
- use of reasonably available expert assistance
- use of reasonably available technology

One of the problems in the proposed solution is that the user has to be able to prove the diligent search even if it was made a long time ago. Therefore, the user would be obliged to keep records for a long time.

There is no verification of 'diligent search' by any administrative body (right holders – especially photographers, illustrators and graphic artists, are afraid that the search would not be sufficient). It would be up to a court to decide if a search was 'reasonably diligent' in the given circumstances.

The user would have to pay a monetary relief (at the rate of a licence fee) only if the right holder reappears, not in advance. In case of a non-commercial use – no monetary relief would be required. The liability rule provides for a limitation on injunctive relief. Full injunctive relief is available if the orphan work has been republished or posted on Internet without any transformation of its content. If the orphan work has been incorporated into a derivative work, the right holder cannot obtain the full injunctive relief to prevent the exploitation of the derivative work, provided that the user pays a reasonable compensation and makes adequate attribution.

¹⁹ S. van Gompel, "Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?", 38 IIC 6/2007. p. 669-693.

²⁰ See Annex 3 to this Report.

Other initiatives

As a part of the current *Australian* copyright reform agenda, the Australian government has stated its intention to conduct a review into orphan works. The terms and references of the review have not been announced. The government has stated that, to some degree at least, some of the concerns around orphan works will be addressed by proposing legislative reform *i.e.* a review of Australian rules in the area of exceptions and limitations to copyright, including fair dealing. At this stage, however, we do not know which option will be chosen.²¹

3. Cross-border aspects and prevention of orphan works in future

Cross-border aspects

As described above, there exist several ways to find a solution to the problem of orphan works and facilitate the use of them. It is at the sole discretion of the Member States to choose and adopt any mechanism that is suitable for them.

However, once digitised and made available to the public, especially via Internet, the borders do not exist any more and the material may be easily transferred from country to country. Due to the ‘cross-border’ value of digitisation and further exploitation of works in the digital form, as well as the possibility of adopting different kinds of solutions (as presented in point 2 of the present chapter), any solution adopted by Member States should be interoperable in other countries within the European Union in particular to avoid duplication of efforts and maximise investment. The idea is that Member States should recognise solutions adopted by other Member States, if the solutions fulfil the same (common) criteria and principles. The common principles still need to be established. It seems, however, that the principles should cover the following issues:

- (a) provide legal certainty for users (usually cultural institutions as they are digitising cultural material on a large scale and are willing to reuse works also with an unclear copyright status) and ascertain interest to right holders;
- (b) establish ‘due diligence search’ guidelines to find right holders;
- (c) provide provisions in case the right holder of an orphan work reappears.

How to prevent orphan works in future?

Another issue that is of great relevance is how to prevent the phenomenon of orphan works in the future. A more efficient way of providing clarification of the copyright status of works should be perhaps developed. One solution for preventing future orphan works could be to promote creation of databases containing information on works (including orphan works) and on right holders. Also, especially what concerns the digital-born material, improved inclusion of metadata (information on right holders) should be promoted.

Another solution to this problem would possibly be a wider application of Creative Commons Licences to avoid the need to individually clearing any further use of work. The *IViR report on creative commons licences for cultural heritage institutions* concludes that although the Creative Commons (CC) Licences do not offer a solution for orphan works, cultural heritage institutions can stimulate the use of CC Licences as a strategy to prevent future orphan works.²²

²¹ See Annex I to the Interim Report.

²² Esther Hoorn, Creative Commons Licences for cultural heritage institutions, A Dutch perspective, IViR, September 2006, http://www.ivir.nl/creativecommons/CC_for_cultural_heritage_institutions.pdf, p. 12-13.

4. Summary

The three main types of legislative solutions differ significantly as they are based on different legal concepts.

The system of extended collective licensing is not specifically tailored to orphan works but as its application is general, it can cover the problem of orphan works as well. The system applies automatically to all right holders in a given field, even unknown or untraceable. However in Europe, the ECL system functions only in few countries on a large scale. Although the Copyright Directive does not contain any provisions in relation to neither orphan works nor the management of rights, point 18 of its Preamble provides that the Directive remains without prejudice to any arrangements of Member States concerning management of rights, such as extended collective licensing.

A model based on a non-exclusive licence is different as it requires the active role of an independent body which has the power to issue a non-exclusive licence. This system requires providing diligent search for the right holders prior to the use of orphan works and paying a fee. In the European Union only the UK law foresees the possibility of issuing a non-exclusive licence but the system has a relatively narrow scope. The UK Copyright Tribunal can issue consent for use of orphan works only in relation to sound recordings. On a large scale this system so far only applies in Canada. The Hungarian provisions that foresee a similar system are still under the form of proposal. It seems also, that Member States can legally introduce provisions establishing a mechanism of issuing a non-exclusive licence by an administrative or public body without prejudice to the Copyright Directive.

The third option, a model based on limitation or exception to copyrights, does not function for the moment in any legislation. The concept however, is similar to the 'Canadian model' in the sense that the user has to provide the diligence search prior to use. The main difference is that as the user could use the work under an exception to copyrights, there is no administrative body to control if the search for the right holder has been diligent enough and secondly, that the fee would be payable only after the reappearance of the right holder. This solution, for the moment, is not compatible however with EU legislation as the Copyright Directive does not foresee any possibility for Member States to introduce new exceptions or limitations to copyrights (the list of possible exceptions and limitations to copyrights in the Directive is exhaustive). That is why the solution of the UK would require changing the European copyright law prior to introducing a new limitation to copyright in UK legislation.

The problem of orphan works is very complex, especially because of the cross-border aspect of digitisation and following the reuse of digital material. Still, the majority of countries in the European Union do not have any legislation concerning use of orphan works. Therefore it is essential that Member States should adopt a mechanism that will be interoperable in other countries within the EU with the 'mutual recognition' option.

II. Actions initiated at the EU level

The European Commission has already undertaken actions in the field of orphan works aiming to facilitate the search for a European-wide solution. Its role is, among others, to coordinate actions at national level to create a platform for discussion on the possible European-wide solution to orphan works.

After having presented in chapter I the nature of the problem of orphan works and possible legislative solutions to it, the present chapter provides information about actions that have been undertaken at EU level. These actions are of a different nature: legislative (Commission Recommendation, Council conclusions) and advisory (work of HLG and Copyright Subgroup). Furthermore this chapter describes actions that have been undertaken by the stakeholders at the initiative of the European Commission and their contribution to the discussion. The follow-up to the Commission Recommendation, *i.e.* actions undertaken by Member States are presented in Chapter IV.

1. Commission Recommendation and Council conclusions

On 24 August 2006, the European Commission issued the *Recommendation on the digitisation and online accessibility of cultural material and digital preservation*²³. In the part entitled “*Digitisation and online accessibility*” in point 6, the Recommendation provides that Member States are encouraged to “*improve conditions for digitisation of, and online accessibility to, cultural material by:*

(a) *creating mechanisms to facilitate the use of orphan works, following consultation of interested parties, (...)*

(c) *promoting the availability of lists of known orphan works and works in the public domain*”.

Thus, the Recommendation not only encourages Member States to deal with the problem of orphan works, but also creates a possibility for stakeholders to be consulted with the aim to discuss possible solutions and mechanisms in relation to orphan works.

The Commission Recommendation was endorsed by the *Council Conclusions on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation*.²⁴ In the Annex to these conclusions, the Council indicates priority actions which should be taken by Member States and by the Commission. In relation to orphan works, the Council provides that:

- Member States should “*improve framework conditions for digitisation and online accessibility of cultural material and digital preservation by: (...)* having mechanisms to facilitate digitisation and online access of orphan works and out of print and out of distribution works, while fully respecting content owners' interests and rights”
- the Commission should “*address framework conditions by proposing solutions on certain specific rights issues, such as orphan and out-of-print works, while fully respecting content owners' interests and rights, and ensuring their effectiveness in a cross-border context*”.

²³ Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, L 326/28 of 31 August 2006, 2006/585/EC,

http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/recommendation/en.pdf

²⁴ Council Conclusions on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, 2006/C 297/01

http://ec.europa.eu/information_society/activities/digital_libraries/doc/culture_council/council_conclusions_nov_2006/en.pdf

2. HLG and Copyright Subgroup

Within the "i2010: Digital Libraries" initiative, the European Commission is currently providing a policy promoting digitisation, online accessibility and preservation of digital material of different cultural institutions. In this context, on 27 February 2006, the European Commission issued a decision setting up a High Level Expert Group (HLG) on Digital Libraries. The task of the HLG is to "*advise the Commission on how to best address the organisational, legal and technical challenges at European level*" and "*contribute to a shared strategic vision for European digital libraries*"²⁵. During the first meeting of HLG, which took place on 27 March 2006, the HLG established a Copyright Subgroup. Its task is, amongst others, to deal with and to find a solution to the issue of orphan works.

The Copyright Subgroup of the HLG produced two reports. In the first report of 16.10.2006²⁶ (Interim Report) the Copyright Subgroup stated that a solution to the issue of orphan works would be desirable. In its second report of 18.4.2007²⁷, the Copyright Subgroup focused on the issue of diligent search requirements in relation to orphan works.²⁸

The Copyright Subgroup focused on several issues. First of all, it recognised the interests of both users (that are, in the majority of cases, cultural institutions providing digitisation of cultural material) and right holders. The Copyright Subgroup agreed on core principles that are important for both parties.

For libraries, archives and museums it is important:

- To have legal certainty in their activities
- Access means either within the premises of libraries, archives and museums or online availability
- For borne digital works or works digitised by right holders this means getting permission for access to works
- For analogue works this means getting permission for large scale digitisation and access
- Legal certainty presupposes a solution for so called orphan works: unknown or non locatable right holders and their works

For right holders the governing principles are:

- Respect for copyright and related rights, including a moral right of creators and performers of copyrighted works
- Digitisation and use within the premises of libraries should take place with right holders' consent or be based on statutory exception
- Online availability should take place with right holders' consent
- Right holders' consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof

Secondly, the Copyright Subgroup underlined the importance of the interoperability of future solutions to the problem due to the cross-border nature of digitisation and further

²⁵ Art 2 of the Commission Decision of 27 February 2006 setting up a High Level Expert Group on Digital Libraries, Official Journal L 63/25, 2006/178/EC, 4 March 2006.

²⁶ To see the text of the first report (Interim Report):

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

²⁷ To see the text of the second report:

http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295

²⁸ For further information, see also the HLG website:

http://ec.europa.eu/information_society/activities/digital_libraries/hleg/index_en.htm

exploitation of works. As some Member States already have mechanisms facilitating the use of orphan works and the clearance of rights while others do not, the interoperability and mutual recognition of mechanisms is a key issue.

“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. Mutual recognition is important with a view to the cross-border nature of the use.”

The Copyright Subgroup agreed that although solutions for orphan works may vary in different Member States, they should still fulfil the same principles, such as:

- 1) cover all orphan works
- 2) include guidance on diligent search for right holders
- 3) include provisions if the right holder reappears
- 4) offer cultural, non-profit establishments special treatment
- 5) recognise that clearance of rights may not always be possible at the level of each unique item
- 6) offer a possibility to use an orphan work to commercial users
- 7) include a requirement for general remuneration if the right holder reappears

Following this, the Copyright Subgroup suggested that in order to ascertain the interoperability between Member states, common ‘diligent search’ criteria for finding right holders should be established. The idea was that Member States recognise solutions in other countries when they fulfil the ‘diligent search’ criteria.

“Member State are encouraged to recognise solutions in other countries that fulfil ‘diligent search’ criteria in order to achieve the cross-border effect needed in Digital Library Initiative. As a result, material that can be lawfully used in one Member State would also be lawfully used in another.”

“Mutual recognition is necessary with a view to the trans-border nature of the use. If the use in the country where digitisation is made/making available is initiated is a permitted use, the further use in any EU or EEA country would be recognised as a permitted use.”

The Copyright Subgroup recommended that *“Where there are works that are non identifiable or right holders who are not locatable (so called orphan works), Member States are encouraged to establish a mechanism that enables the use of works [...] against agreed terms and remuneration, when applicable, if reasonable search prior to the use of orphan works has been performed in trying to identify the work and/or locate the right holders. The mechanism in the Member States needs to fulfil the following criteria:*

- a) *the solution should be applicable to all kind of works*
- b) *a bona fide/good faith user needs to conduct a thorough search/ reasonable search prior to the use of the work*
- c) *work category specific guidelines or best practices can be worked out by stakeholders in different fields, but search guidelines should not form part of legislation.”*

With respect to ‘due diligence search’, members of the Copyright Subgroup submitted several descriptions of what this concept might entail. It was mentioned that the notion of diligent search should consider several elements, such as: the kind of orphan work, the kind of exploitation envisaged or the kind of user. Also it was mentioned that the criteria for search would depend on which solution was chosen by the Member State. In the case where a licence

is issued, the evidence of performing due diligent search is evaluated by the body that issued this licence. In the case where a Member State chooses a solution of limited liability rule (limitation or exception to copyrights), full legal certainty for the user is achieved only after a court examines the case and considers that the search was indeed reasonable. However, it was also stated that more detailed, sector-specific diligent search criteria needs to be developed.

The Copyright Subgroup advocated a flexible approach of any regulatory actions. It was stated that *“any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted due to rapidly changing information sources or search techniques”*.

Finally the Copyright Subgroup recognised the issue of preventing future orphan works. The Copyright Subgroup agreed that providing clarification and transparency in the copyright status of works is a key element to facilitate the use of orphan works. The group stated that non-legislative solutions should be promoted in order to enhance transparency and/or prevent the further expansion of the phenomenon of orphan works.

Some non-legislative solutions to prevent the further expansion orphan works:

- dedicated databases concerning information on orphan works,
- improved inclusion of metadata (information about right holders) in the digital material,
- enhanced contractual practices

3. Ongoing actions undertaken by institutions and stakeholders at the initiative of the European Commission

At the 5th meeting of the Copyright Subgroup of the HLG on 25-26 June 2007, the Copyright Subgroup suggested that there is a need to involve a broader range of stakeholders in order to discuss more in detail the issue of orphan works and due diligence criteria for the search of right holders. The Stakeholders Seminar was organised at the Commission premises in Brussels on 14 September 2007²⁹.

At the meeting stakeholders expressed that they would like to engage themselves in further discussion in order to find workable solutions for orphan works and that irrespective of legislative measures adopted by Member States, they wanted to work out due diligence search guidelines. They invited the European Commission to initiate a suitable working mechanism to discuss the matters of due diligence guidelines specific for each sector with coordination between groups to ensure cohesion. In consequence, four Working Groups were established for the following sectors: text, music/sound, audiovisual, visual/photography.

The objective of the Working Groups is to create sector-specific due diligent search criteria for search of the right holders and by this means facilitate use of orphan works. The exercise of stakeholders is to be finished by spring 2008. The criteria, if agreed, could then be signed by stakeholders (European representative of cultural institutions and industries) in the form of Best Practices or Industry Guidelines.

The stakeholders are now working on the following issues:

- 1) The extent of the problem: the definition of an orphan work and of stakeholders in their sectors as well as the different subcategories of orphan works (if any exist)

²⁹ See more information about the Stakeholders' Seminar on:
http://ec.europa.eu/information_society/activities/digital_libraries/hleg/index_en.htm#Consultations_with_stakeholders

- 2) Sector-specific diligence search criteria to identify and/or locate the right holder with identification of major resources for search
- 3) The possible measures to prevent the birth of orphan works in future

There are some sensitive points under discussion, such as:

- 1) the issue of historic cut-off dates for search or for different search criteria for orphan works (also guidelines on type of material that can be presumed to be orphan in absence of proof to the contrary),
- 2) the issue of mass digitisation clearance (guidelines on bulk search)

Both the issue of historic cut-off dates and guidelines on bulk search criteria are problematic. While there exist some examples of mechanisms that foresee the institution of cut-off dates, the issue of clearance rights for orphans in case of mass digitisation seems, for the moment, far from being solved.

Example of cut-off dates:

The UK legislation contains a provision concerning historic cut-off dates. The provision applies for “*a single publication of an unpublished textual work that is at least 100 years old and whose author has been dead for at least 50 years so long as the present rights owners is unknown and the work is available to the public in a public institution*”.³⁰

4. Summary

The Commission Recommendation and Council conclusions recommend that Member States introduce a mechanism that could facilitate use of orphan works in their countries. It should be underlined however, that these documents foresee ‘a mechanism’, not necessarily a ‘legislative mechanism’. Member States are then free in finding suitable solutions.

It is worth highlighting that the Copyright Subgroup of the HLG is of the opinion that whatever solution would be applied by one Member State, should be interoperable with solutions introduced by other countries, in respect of the cross-border nature of the issue. The group pointed out several criteria that Member States should respect while introducing a mechanism for orphan works in their countries.

The Copyright Subgroup stressed that guidelines for the diligent search should be established. The process is under way and, at the initiative of the Copyright Subgroup, various stakeholders are now working on specifics for their respective sectors guidelines for diligent search of right holders (text, music/sound, visual/photography and audiovisual). As there are several types of categories of orphan works and a variety of stakeholders, other kinds of problems arise in searching for them. In consequence, particular criteria of diligence search might apply and need to be established for each sector. The 'due diligence guidelines' are foreseen to be endorsed by stakeholders at the end of the exercise. Also, during discussions some sensitive points have arisen, such as the possibility to agree on historic cut-off dates or search criteria for mass digitisation.

³⁰ See ss 7(6), ss 7(9d) of the Copyright Law of 1956 (Copyright Designs and Patents Act 1988, Schedule 1 Paragraph 16). The provision was preserved for works created before 1 August 1989 by the Copyright Designs and Patents Act. Information provided among others on the British Library website: <http://portico.bl.uk/cgi-bin/print.cgi?url=/collections/manuscriptscopy.html>

III. Actions undertaken independently by institutions and stakeholders

Independently of the actions stimulated by the European Commission and in Member States, some institutions and stakeholders are undertaking actions in order to find a mechanism that could enable use of orphan works. The scope of actions and solutions differs – from those that are applicable within a particular country to those that are international, either to all kinds of orphan works or within a particular sector. These actions may also be of a different nature. Some of them build on working mechanisms which are already in practice, while others are still looking for the best approach to solve the problem of orphan works and therefore contribute to the discussion in general.

This chapter contains selected examples of best practices from cultural institutions and collective management organisations, solutions that have been recently worked out by institutions and stakeholders, as well as examples of actions which are currently underway.

1. Working mechanisms

1.1. Practices of different institutions

Not many institutions have developed practices to deal with orphan works. When some of them undertake actions or develop mechanisms to use or facilitate use of orphan works, usually the scope of their actions is limited to the territory of the country and applies only to orphan works from the sector of a given institution.

Institut National de l'Audiovisuel (*Audio-visual sector*)

The French National Audiovisual Institute (Institut National de l'Audiovisuel, INA), has the role to preserve and exploit audiovisual material produced or co-produced by public television companies. INA has concluded several agreements with collective management institutions representing right holders in order to be able to exploit the audiovisual material still in copyright. The agreements were concluded with the following societies:

- SACD – Société des Auteurs et Compositeurs Dramatiques
- SCAM – Société Civile des Auteurs Multimédia (Société de gestion collective des droits d'auteur dans le domaine du multimédia)
- SDRM – Société pour l'Administration du Droit de Reproduction Mécanique
- SACEM – Société de Gestion Collective du Droit d'Auteur pour la Musique
- SESAM – Guichet Commun pour Gérer les Droits des Auteurs dans le Multimédia

Under these agreements, INA has a general authorisation to use the audiovisual and sound material and catalogue of the above-mentioned societies for any mode of exploitation (including Internet and mobile telephony). However, in the case where INA would like to exploit a work whose right holders are not represented by above-mentioned societies, it still has to identify and locate (perhaps unknown) right holders to clear the rights.³¹

SOFAM, Foto Anoniem (*Visual / photography sector*)

In Belgium SOFAM, the collecting society for visual arts, and in the Netherlands Foto Anoniem, a foundation linked to Bufaro, the Dutch organisation for professional photographers, are helping prospective users to find copyright owners of photographic works. If the right holder cannot be found, these organisations can assure the user legal protection by granting an indemnity. To receive protection, the user has to pay compensation, usually at the

³¹ See S. van Gompel, 'How to Address...', see also Interim Report.

rate of a licence fee. Although this system provides the user with a legal certainty against the financial liability, a right holder has still the possibility to seek injunctive relief or to sue the user under criminal law.³²

Austrian National Library

The Austrian National Library has been digitizing and making available to the public old newspapers within an initiative called 'ANNO' (AustriaN Newspapers Online).³³ Before doing this, the historical material has to be checked whether it contains works whose authors or their successors can be identified. Where right holders cannot be identified, the material can be digitised only after the period of 70 years from the publication (under provisions concerning anonymous works)³⁴. This first check of the overall copyright status of a particular historical newspaper is not – and cannot be in a mass digitization initiative – a thorough legal assessment or right clearing process on an article basis. It is a basic assumption of the Austrian National Library that newspapers – that e.g. have disappeared from the market more than 50 years ago and deal with everyday subjects, and where the authors had not or only marked their articles with just their initials – can be considered to contain only anonymous works (unless an author is known to have worked for this particular newspaper and her/his works can easily be identified). Any search for a right holder is deemed to be futile and completely out of relation comparing the involved costs with the significance of the individual article.³⁵

1.2. Agreement between institutions and stakeholders

There is one mechanism that has recently been worked out on a voluntary basis by different stakeholders and institutions concerning dealing with orphan works, which is functioning in practice. It is an agreement signed up by publishers for use or orphan works in the field of scientific, technical and medical literature.

The International Association of Scientific, Technical & Medical Publishers (STM) started its policy concerning orphan works in December 2006. In 25 October 2007³⁶, STM together with the Association of Learned and Professional Society Publishers (ALPSP) and the Professional Scholarly Publishing (PSP), the division of Association of American Publishers (AAP), agreed on *Safe Harbour Provisions* for the use of orphan works for Scientific, Technical and Medical literature.

Safe Harbour Provisions³⁷

To the extent that a publisher owns 'orphan works', users who comply with the guidelines will be entitled to the "safe harbour" provisions.

If a publisher identifies the work used as orphan work and informs the user about the ownership and if the user has met the requirements, the publisher agrees to waive any claim or

³² See S. van Gompel, 'How to Address...".

³³ See the website of the Austrian National Library: <http://anno.onb.ac.at/>

³⁴ According to Art. 61 of the Austrian Copyright Act copyright shall terminate 70 years after the work was made public where the author of a work (Article 10(1)) has not been designated in a manner that creates a presumption of authorship under Article 12. This provision is in line with Art. 1 (3) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, Official Journal L 372, from 27/12/2006, p. 12 (Copyright Term Directive).

³⁵ Information provided by the Austrian National Library within the framework of MSEG.

³⁶ Updated version: 2 November 2007.

³⁷ To see full text of the document: <http://www.stm-assoc.org/documents-statements-public-co/>, www.alpsp.org/ForceDownload.asp?id=579

entitlement to all fees or damages including statutory, punitive, exemplary or other special or general damages, other than a reasonable royalty.

The requirements are:

- the user has to be able to prove that he made a reasonably diligent and good faith search for the right holder; although it is not possible to provide an exhaustive list of resources, the search should be conducted in general in:
 - published indexes or published material relevant for the publication type and subject matter
 - indexes and catalogues from library holdings and collections
 - sources that identify changes in ownership of publishing houses and publications including from local reprographic rights organisations
 - biographical resources for authors
 - searches of recent relevant literature to determine if the citation to the underlying work has been updated by other users or authors
 - relevant business or personal directories or search engines searching for businesses or persons
 - sources on the history of relevant publishing houses or scientific, technical or medical disciplines
- the user has to make an attribution to the original work, author, publisher, copyright owner, etc
- if the right holder identifies the work, the user has to pay a reasonable royalty
 - the royalty rate or fee will be identical to the publisher's normal permissions request rate; if the use goes beyond the normal use then the publisher makes a good faith effort to determine the reasonable royalty rate
- after the right holder has been identified, further use must be agreed by the copyright owner (beyond derivative use and further distribution).

2. Solutions supported by institutions and stakeholders

Due to the lack of existing solutions in the majority of countries, institutions and stakeholders, mostly at the level of their federations, try to design the best possible solution on how to deal with orphan works. A few institutions recently issued position papers. The following part gives examples of statements issued by cultural and collective management institutions as well as a joint statement concluded between libraries and publishers.

IFRRO statement³⁸

In May 2007, the International Federation of Reproduction Rights Organisations on orphan works (IFRRO) issued the following statement:

"To enable use of orphan works within the framework of copyright, IFRRO encourages regulators to support (including by legislative measures where appropriate) voluntary solutions between right holders and users complying with the following criteria and in a way that is interoperable internationally:

- Any orphan works solution should be applicable to all kinds of protected works [so also unpublished – my remark]
- A bona fide user needs to conduct a thorough search employing a high level of care prior to using an orphan work

³⁸ See full text of IFRRO statement:

<http://www.ifrro.org/upload/documents/IFRRO%20Statement%20on%20Orphan%20Works%20May%202007.pdf>

- Regulators should support stakeholders in different fields to work out category specific guidelines and the best practices and should avoid setting minimum standards in legislative measures (including for reasonably diligent good faith search)
- Regulators should support the creation and maintenance of databases concerning information on orphan works
- Regulators should support right holders' initiatives for improved inclusion of metadata in digital material
- Any solution should ensure attribution (of the work and its right holders) by the user throughout to the extend possible
- Any solution should respect moral rights to the extend possible
- Any orphan works solution should include an entitlement to equitable remuneration to the right holder for the use of his work and should contain mechanisms for withdrawal of the work regarding future licences when the right holder reappears

This does not affect the existing legal framework regarding the duration of copyright, the scope of copyright liability or the applicability of exceptions or defences to infringement or the availability of remedies."

Joint Statement of IFLA and IPA³⁹

Agreement concerning the use of orphan works between International Federation of Library Associations and Institutions (IFLA) and International Publishers' Association (IPA).

The principles which IFLA has agreed with the IPA set out clearly what *bona fide* users of orphan works must do to avoid being held liable for copyright infringement, and what should be done if a missing copyright owner is found after the work has been used.

In June 2007, IFLA and IPA agreed on key principles concerning the use of orphan works. The organisations agreed that any regulative system should provide issues about:

- (1) reasonable diligent search criteria for the copyright owner
 - a. the user shall conduct a reasonable diligent search in good faith in order to identify, locate, contact the right holder
 - b. the user shall also inform him/herself about the sources – where the information about the right holder can be found
 - c. a number of search steps could not be imposed by any regulative system (in order to provide a flexible approach)
 - d. stakeholders should develop and make publicly available what they consider the reasonable diligent search
 - e. the user must be able to prove that the search was in compliance with the search criteria
- (2) attribution – the user shall provide a clear and adequate attribution to the copyright owner in the use of work
- (3) reasonable remuneration for the copyright owner or appropriate restitution
 - a. reasonable remuneration for the right holder has to take into account also the interest of the user
 - b. the right holder is entitled to remuneration except for non-commercial use by a non-profit institution, in which case the right holder is entitled to expeditious termination of the use
 - c. the user should not be penalized for using a work
- (4) limitation on injunctive relief – when the injunctive relief is available, it should be flexible to take into consideration the creative effort and investment made by the user in good faith

³⁹ See full text of IFLA/IPA joint statement: <http://www.ifla.org/VI/4/admin/ifla-ipaOrphanWorksJune2007.pdf>

- (5) non-exclusivity of use – the user can intervene against further uses of the same orphan work only in the case of infringement of his new rights in derivate works.

LACA statement⁴⁰

The Libraries and Archive Copyright Alliance (LACA) brings together the UK's major professional organisations and experts representing librarians and archivists to advocate a fair and balanced copyright regime and to lobby about copyright issues affecting the ability of library, archive and information services to deliver access to knowledge in the digital age.

In December 2007 LACA issued a statement concerning use of orphan works. In a statement the definition of the orphan works and of the nature of the problem is presented as well as several solutions:

- a) licensing solution
 - a. an appropriate body would give a licence
 - b. the user would pay a fee which would be transferred to the right holder if he reappears within a period defined by statute or would be used for other purposes
- b) diligent search solution
 - a. exception is based on a reasonable enquiry to identify and locate the right holder, the application of which would depend on the court's assessment of the diligence with which users had conducted their enquiry
 - b. provisions concerning the remuneration in case the copyright owner reappears and further use
- c) mass digitization solution
 - a. special exception for non-profit cultural, educational and research institutions
 - b. solution would apply if a large number of orphan works would be used
 - c. application of the exception would depend on
 - i. the scale of the project and the proportion of orphan works involved, based on a reasonable assessment which has shown them to be predominant
 - ii. the publication of notices inviting copyright owners to come forward
 - iii. the use, as appropriate, of readily-available information sources to locate known rights owners
 - iv. the publication and operation of clear policies on the taking down of works to the use of which copyright owners reasonably object
 - v. the willingness to pay appropriate fees for continued use on the basis of the fees that would have been payable had prior permission been obtained

The solution would depend on the kind of work, for instance the licensing solution would be the best one for published works (but not for unpublished).

It is pointed out that there is a need to take into consideration the cut-off dates, perhaps different for different type of material. It is also stated that in any case a proper attribution should be required. Other issues concern:

- a) in countries where there are no compulsory collective licensing schemes, licensing bodies can issue a licence only if they are mandated to do so by their members. As the right holders are unknown or untraceable, licensing bodies must be willing to issue licences without a mandate or legislation must authorise them to do so and provide them with an appropriate indemnity
- b) a need for a transparent mechanism which will determine what is done with the money (fees)
- c) when the right holder reappears, he should prove his rights

⁴⁰ See full text of LACA statement: <http://www.cilip.org.uk/NR/rdonlyres/E6F612ED-6CE1-4723-8348-CB7162D983C2/0/LACAorphanworksstatementFINAL19dec07.pdf>

- d) the remuneration for the right holders should be equitable to both parties and should not involve any payment for damages
- e) it should be clear what would constitute the suitable diligent search. The diligence would depend on the nature of material as well as on the nature of use (commercial or non-commercial)
- f) rights owners are entitled to reassurance that the avoidance of any form of diligent search in a mass digitisation solution does not unduly harm their interests
- g) the users need the legal certainty – the purpose is to encourage use and to prevent risk
- h) without some kind of preventative action, the orphan works problem will continue to grow. Provision therefore needs to be made for the secure supply of up-to-date rights information in the metadata for new digital works.

3. Ongoing actions undertaken by institutions and stakeholders

The discussion of orphan works is spreading within the European Union. More and more institutions are undertaking actions aimed at developing mechanism that could facilitate use of these works. The following part presents examples of ongoing actions of some institutions.

Centre d'exploitation du droit de Copie (*Text sector with visual / photography as cross sector*)⁴¹

In October 2007, the French Centre d'exploitation du droit de Copie (CFC) has established an informal working group for orphan works in the text sector. The group is composed of representatives from text and visual authors and on the other side from book and press publishers. The representatives of visual works are to discuss cases where the image is included in text editions (illustrations). The objective of this group is to find a common approach to the problem of orphan works. The group is focusing on the following aspects: definition of orphan works, reduction of the number of orphan works and prevention of orphan works in the future, due diligent search, management of orphan works and distinction between mass use of orphan works and others.

1. Definition. CFC working group defines an orphan work as a work in copyright whose right holders are impossible to contact despite deep and serious search. Some examples of the complexity of the problem were given: where one among multiple joint authors cannot be found, works that had been published beyond France, unpublished works such as Master theses, works that include other works.

2. Reduction of the number of orphan works and prevention of orphan works in the future. CFC working group is of the opinion that it would be useful to give a wide access to bibliographic resources. The group suggested the creation of an Internet portal which would give access to these resources. It was also suggested to first contact publishers and where impossible, the authors (as well as look in the database of inheritors).

3. Due diligent search. The group expressed the idea that it would be necessary to work out due diligent search criteria. The group suggested that it would be preferable to differentiate due diligence, depending on whether it would concern one use of one work or a large number of orphan works. It was also said the search should be done at the sole responsibility of the prospective user.

4. Management of orphan works. It was expressed that the best solution of the management of orphan works would be mandatory collective management. This solution was

⁴¹ More information about CFC work on orphan works: <http://bat8.inria.fr/~lang/orphan/documents/france/CFC-NOTE-D-ETAPE-2007.10.02.pdf>

also put forward in the proposal of amendments of CRPC (Commission pour la Relance de la Politique Culturelle) from 22.02.2007.⁴²

5. Distinction between mass uses of orphan works and others. The working group stated that application for the usage of small and significant numbers of orphan works should be treated in different ways. For the mass usage of orphan works, the following mechanism has been suggested. First, the prospective user should try to reduce the number of orphan works of his application. Secondly, the list of orphan works should be published to enable right holders to manifest themselves. Finally, the user could obtain a renewable authorisation for a certain period of time for all orphan works, in which case, he would be obliged to systematically repeat the search for right holders.

Deutsche Nationalbibliothek, Boersenverein des Deutschen Buchhandels, VG Wort⁴³
(Text sector)

The German National Library (Deutsche Nationalbibliothek) together with publishers (Boersenverein des Deutschen Buchhandels) and the reproduction rights organisation (VG Wort) is currently working on a solution concerning orphan works. Their proposition to provide diligent search for right holders is the following. First the user (library) should check whether the book is on sale and whether it is still protected by copyright. Then, find the publisher through the publishing house. The publisher can: (a) conclude a licence agreement, (b) refuse the licence, if he wants to establish and use a digital version himself, (c) refer the library to the right holder, if, for example, he does not have the rights for online publication, or (d) refer the library to the collecting society, if, for example, it is impossible to trace the right holder. Finally, if the right holder still cannot be found, the book is considered as an orphan work. To digitise such a book, the library has to pay a fee to an escrow account of the collecting society and thus obtains a legal certainty.

Other initiatives

Furthermore, some different actions contributing to finding a solution are underway in the Netherlands. For instance, the National Library of the Netherlands (Koninklijke Bibliotheek) is currently working on a Database Digital Daily Newspapers.⁴⁴ Also, the Netherlands Institute for Sound and Vision (Nederlands Instituut voor Beeld en Geluid) has been "*organising rights clearance for older material of the public broadcasting companies, the so called 'legacy archives'.*"⁴⁵

4. Summary

Generally speaking, stakeholders and institutions very often have a common approach to a possible solution. They are of the opinion that prior to the use of an orphan work, a diligence search should be performed by the prospective user in order to find the copyright owner(s). They agree that any solution should require making an adequate attribution. Due to the fact that the purpose is to facilitate the use of orphan works, which means that the legal certainty for the user should be provided, if the right holder reappears, he or she could claim "only" a reasonable remuneration instead of an injunctive relief.

Despite the common approach to this problem of some stakeholders and institutions, the scope of actions provided by institutions and stakeholders in general differs significantly.

⁴² See Chapter IV.

⁴³ Information provided by the text Working Group at the stakeholder's meeting initiated by the Commission.

⁴⁴ Information provided by the text Working Group at the stakeholder's meeting initiated by the Commission.

⁴⁵ Esther Hoorn, Creative Commons Licences for cultural heritage institutions, A Dutch perspective, IViR, September 2006, http://www.ivir.nl/creativecommons/CC_for_cultural_heritage_institutions.pdf, p. 12-13, 63.

There are few mechanisms already functioning for orphan works – only a couple of examples of best practices of institutions and one agreement between stakeholders are known. In addition to this, the scope of mechanisms is different as each time it depends on the function of a particular institution or the particular agreement (some are limited to a particular sector or territory of the country). Other actions, such as statements and position papers of stakeholders' associations are relevant as they contribute to the discussion about the problem, but are not solving it so far in practice. Besides, as their actions are undertaken on a voluntary basis, there is no coordination between them in a wider perspective.

The few mechanisms that do exist either fail to solve the problem or do so in a narrow or local scope. That is why there is a need and expectation from different actors to solve the problem at national level. As the European Commission issued the Recommendation encouraging Member States to introduce mechanisms with the aim to facilitate use of orphan works, it is now for the Member States to provide suitable measures, preferably in a coordinated or at least interoperable manner.

IV. Actions undertaken by Member States as a follow-up to the Commission Recommendation

Member States are required to report on actions undertaken in response to the *Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation* 18 months after its publication in the Official Journal and every two years thereafter. In order to "monitor progress and assess the impact of the implementation of the Recommendation (...), to provide a forum for cooperation between member State bodies and the Commission at European level and to exchange information and good practices of Member States' policies and strategies on the digitisation and online accessibility of cultural material and digital preservation"⁴⁶, the European Commission issued a decision setting up a Member States Expert Group (MSEG) on Digitisation and Digital Preservation. The present chapter presents information gathered from MSEG concerning actions that were undertaken by Member States (if any) in relation to the issue of orphan works within the response to the Commission Recommendation.

1. Information provided by Member States

The following part of this report provides information about measures that were taken by Member States to facilitate the use of orphan works. The information was gathered in preparation of and shortly after the MSEG meeting which took place on 13 December 2007 on the premises of the Commission in Luxembourg. The information was submitted at the request of the European Commission in the form of questionnaires (first of June 2007 and second of November 2007), as a result of bilateral exchange of information between the European Commission and Member States and finally, in the MS final reports on the progress in the implementation of the Commission Recommendation which MS had to submit by the end of February 2008.

In the questionnaires, the European Commission asked MSEG what had been done in their countries in relation to the implementation of the Commission Recommendation. The questionnaires *inter alia* provided questions about the issue of orphan works. In the first questionnaire, the European Commission asked as follow: "What mechanisms and good practices exist in your country and what measures are foreseen to implement the specific provisions of the Commission Recommendation and the Council Conclusions in relation to orphan works (...)." In the second questionnaire the question was more general: "Implementation update: Since the first meeting in June, what actions have been carried out or are still foreseen for the issues of the Recommendation and Council Conclusions where no or little progress was identified last time?". In the final reports Member States had to answer questions concerning:

- the progress on mechanisms to facilitate the use of orphan works (6a)
- the progress on mechanisms to facilitate the use of works that are out of print or out of distribution (6b)
- the progress on the availability of lists of known orphan works and works in the public domain (6c)
- the progress on the identification of barriers in your legislation to the online accessibility and subsequent use of cultural material that is in the public domain — and the steps taken to remove them (6d).

⁴⁶ Art 2 of the Commission Decision of 22 March 2007 setting up the Member States' Expert Group on Digitisation and Digital Preservation, Official Journal L 119/45, 2007/320/EC, 9 May 2007

Austria

Existing mechanisms

In Austria, there is neither specific legislation nor special rules concerning orphan works. There is also no due diligence guidelines in the Austrian copyright law.

Austria reports that cultural institutions handle orphan works as out of print works.

“Art. 42 section 7 of the Austrian Copyright Law (Urheberrechtsgesetz) contains already an exclusion concerning the right of reproduction of works out of print and works which are published ("veröffentlicht") but not distributed in a sufficient number ("erschienen"), which allows the reproduction of these works to public institutions, if they do so without commercial intention. This enables the digitisation of these works, but does not allow online-distribution of these digital copies, it allows onsite-access only.”⁴⁷

Follow-up to the Commission Recommendation and Council conclusions

Austria reports that there are no plans to implement any special rules for orphan works or mechanisms to facilitate the use of such works. However, Austria states that if the Commission intends to publish any guidelines, Austria would be interested.

Belgium

Existing mechanisms

Belgium did not provide any information about existing mechanisms to facilitate use of orphan works.

Follow-up to the Commission Recommendation and Council conclusions

Belgium was from the beginning of the opinion that “*a national round table with librarians, authors, editors and publishers could help to clarify the points of views, and bring solutions regarding the rights of all interested parties*”. From August till October, some consultations on the issues of copyright were held. In the consultation process was involved the Belgian Intellectual Property Office. Also, on 12th October 2007, the Belgian Advisory Board on IPR (section: Copyright and neighbouring rights) invited for a meeting representatives of the Ministries of Culture of the Communities and of the Federal Science Policy Office, as well as the Royal Library and the Royal Film Archive. The Belgian Advisory Board on comprises experts from the academic and professional worlds, representatives of the entitled beneficiaries, of the consumers' organisations and of the federations of enterprises. As Belgium reported, the aim of all these meetings was: (i) *to identify the main specific issues related to copyright and neighbouring rights and (ii) to investigate in which framework (legal: existing or new; regulatory; codes of practices) these issues in relation with digitisation, digital preservation and online accessibility could be best handled in Belgium*”. Belgium stated that during the meetings also the issue of orphan works was discussed and that a detailed list of existing legal means and of possible future options has been established.

Next to it, Belgium provided as follow: “*After the meeting in October 2007 with all stakeholders, the Section "Copyright and neighbouring rights" of the Belgian Advisory Board on IPR had a meeting in December where it was decided that the Intellectual Property Office will produce a working document which will be sent end January to the members of the*

⁴⁷ Information provided by Austria in the final report.

Section and to all interested parties (Ministries of Culture of the Communities and Federal Science Policy Office + the Royal Library and the Royal Film Archive). The interested stakeholders will have the possibility to send their comments. Some first conclusions will then be drawn possibly at the next meeting of the Section on the 15th of February.”

Finally, Belgium reported that a report on the outcomes of these discussions is currently under preparation and still needs to get final approval of the Advisory Board on IPR. In addition, Belgium provides the information that *“additional discussions occur at Community level, eg a preliminary document on status quo was set up in Flanders. Just to mention one example of a current pragmatic research in another field, the Flemish project Pokumon will look into some rights clearance issues for the online dissemination and archiving of multimedia performing arts and classic music.”*

Bulgaria

Bulgaria reported that in the field of orphan works *“no progress has been done”* and that *“this area is still not addressed”*.

Cyprus

Existing mechanisms

In relation to orphan works, Cyprus only stated that *“according to the Cypriot State Library, which is under the Ministry of Education and Culture, only one case of an orphan work is known”*.

Follow-up to the Commission Recommendation and Council conclusions

In relation to the given example of an orphan work Cyprus stated that *“an attempt for a solution is currently being decided upon”*.

The Czech Republic

Existing mechanisms

For the moment there exist no specific provisions concerning orphan works. However, the discussion on this topic is ongoing.

In relation to the issue concerning the best practices of cultural institutions while dealing with orphan works, the Czech Republic reports that however *“no relevant best practices have been elaborated and officially published in the Czech Republic (...), some common (unwritten) rules are used:*

- *to stipulate the use (if any exemption or limitation can be applied or not)*
- *to find out the term of protection of work (living author/non-living author/work in public domain)*
- *to define all authors or other rightholders (author, publisher/producer etc.)*
- *to find a subject who can licence the use of work.”*

Following this, the relevant information sources were listed. These steps were also recommended by the Copyright Department of the Ministry of Culture (there are usually no more than 2 or 3 questions from the potential users per year). The Czech Republic reported that even though some cultural institutions look for rightholders and use the information sources, *“many institutions mainly use materials in public domain and copyright-protected*

materials remain hidden” due to the fact that the process of searching the copyright owners is very *“time-consuming, difficult and seldom successful.”*

In the final report, the Czech Republic stated that in order to tackle the problem of orphan works, ACE (the Association of the European Film Archive) worked out a study, addressed to the Ministry of Culture.

Follow-up to the Commission Recommendation and Council conclusions

In the Czech Republic the discussion on the issue of orphan works is ongoing. The working groups have been established in order to discuss this problem.

The Czech Republic reported that on 19 December 2007, the 1st session of the Working Group for European Digital Library (EDL) and Copyright was convened by the Copyright Department of the Ministry of Culture. The Working Group consists of representatives of the relevant departments of the Ministry, collective administrators of copyright and related rights and representatives of some types of relevant users (e.g. libraries, museums, archives, publishers etc.). The main task of the first meeting of the Working Group for European Digital Library (EDL) and Copyright was to inform all participants about the latest documents of the Copyright Subgroup established within the High Level Expert Group (Key principles for orphan works, out-of-prints work and Rights Clearance Centres), to launch consultations on copyright-related problems of the EDL project (among others on orphan works) and to find out the opinions and comments of all participants on the problems in question. It was concluded that the Copyright Department at the Ministry of Culture shall:

- *“prepare translations of the Recommendations of the Copyright subgroup,*
- *publish all relevant information and documents on the Ministry’s website,*
- *prepare a comprehensive document on relevant national and European legislation and an analyse of all proposals of the Copyright subgroup for further discussions.”*

Besides, the Czech Republic stated that further discussion regarding the use of orphan works in the context of digitisation and online accessibility is foreseen. It was stated as follow: *“we suppose that different sector-specific due diligence guidelines shall be developed. We will work on it in cooperation with all relevant stakeholders.”*

The discussion on possible solutions for orphan works in the Czech Republic has only recently been launched. Following proposals come from cultural institutions:

- *“to build information sources of rightholders - supported by state*
- *to build a central database of rightholders represented by collective management organizations*
- *to allow access to the central evidence of citizens for libraries, museums etc. (and to allow them the use of personal data)*
- *to identify relevant information sources for specific group of works or materials”*
- *to support integration of existing information sources*
- *to create a special website for copyright law*
- *to create an independent institution for right clearance of orphan works*
- *to work out rules, guidelines for problem solving, explanations of legislation, model agreements etc.*
- *to increase public awareness about IPRs*
- *to minimize the number of orphan works in the future (better identification of new works)*
- *to educate librarians, museums, archives etc in copyright law*
- *to support consultant services in the field of copyright law”*

Moreover, the last amendments to the Czech Copyright Act in 2006 introduced new types of licences, such as Creative Commons⁴⁸.

Although discussion in the Czech Republic will continue, the Czech Republic expressed that is strongly interested in having “*further and more detailed recommendations and proposals prepared by Copyright subgroup of HLG.*”

Denmark

Existing mechanisms

Denmark, like other Nordic countries, has the Extended Collective Licensing system (ECL).

Follow-up to the Commission Recommendation and Council conclusions

In June, Denmark provided the following statement: *"Within the framework of the work with the national digitisation strategy a special working group has been dealing with the copyright matters. In this working group the understanding between the right holders and the cultural heritage institutions has been very positive and with good progress. It is expected that the result will be a suggestion for a new concept of Extended Collective Licenses."*

Finally, Denmark reported that the legal issues associated with digitisation have been addressed in a proposed revision of the Danish Copyright Law which is now being treated by the Danish Parliament.

"The most important change is a provision for the general use of extended collective licensing. The provision will grant permission for parties to make agreements in an area to be specified by the parties but with consequences for all right holders in that area. The provision includes an opt-out clause for right holders who do not wish to be included in the extended collective license. Moreover the right holders' organisations entering into agreements in this area are subject to approval by the Ministry of Culture.

*The proposal will broaden the use of extended collective licensing from more specific areas to all areas where right holders wish to use this practice. The proposed scheme is also general in the sense that it will make it possible for new parties to make use of extended collective licensing. The legislation will also contribute to solving the problem of orphan works insofar as an organisation is appointed as a representative of the unidentified right holders. The law is proposed to come into force on 1st July 2008."*⁴⁹

Estonia

Existing mechanisms

In reply to the first questionnaire Estonia reported: *"In 2006, Estonia established new legislative framework. According to the Copyright Act the public archives, museums and libraries have the right to reproduce a work included in their collection without the authorisation of its author and without payment of remunerations, when digitising a collection for the purposes of preservation. This rule does not include the right to make the work available on the Internet. There are no specific provisions for orphan works or out-of-print works in Estonian law yet."*

⁴⁸ See art. 46 par. 5-6 of the Czech Copyright Act (No 121/2000 Coll., consolidated version No 398/2006 Coll.).

⁴⁹ Information provided by Austria in the final report.

Follow-up to the Commission Recommendation and Council conclusions

Following to the Commission Recommendation and Council conclusions, Estonia initiated a process of consultation with the aim to introduce a mechanism for orphan works. Estonia reported then that “*since the last report different meetings of interest groups and stakeholders have been held in order to examine matters related with orphan works and out of print works*”. Estonia reported also that “*there is a plan underway to make some further amendments to the Copyright Act in 2008-2009 in order to provide mechanisms to facilitate online access to orphan works.*”

Answering to the question 6c of the final report, Estonia provided as follow: “*There is no urgent need for of lists of known orphan works and works in the public domain. The future legislation will provide a legal license for orphan works and memory institutions will create a list themselves after some year practice.*”

Finland

Existing mechanisms

Finland, like other Nordic countries, has the Extended Collective Licensing system.

Previous initiatives

Finland provided as follow: “*The question of the use of protected works and subject matter whose right holders are not known or who may not be located and contacted (by using reasonable efforts), was identified in 1976, in the beginning of the present, and until these days uninterrupted revision round of the Finnish Copyright Act. The question has been on the work programme since then but was approached in concrete terms only after the year 2000. The reason is that the problem never came to the forefront in a larger scale, and in the meantime more general solutions on different matters solved and removed the question piece by piece. In the preparatory process of the 2002–2005 revision of the Finnish Copyright Act, draft provisions⁵⁰ on orphan works were included in the draft Bill which otherwise focused on the implementation of the 2001 Information Society Directive. The provisions were based on the Nordic model of extended collective licence. The proposal was not, however, included in the final Bill that led to the amendments of 2005. The question of orphan works was left open. This was mainly due to the fact that in the hearing process the representatives of the media companies did not consider such a solution necessary. The matter is still being discussed.*”

Finland reported however that most of the issues concerning the problem of orphan works has been solved in the copyright legislation by:

1) *clauses on limitations of copyright in the Copyright Act concerning the activities of libraries, archives and museums*

2) *the use of the system of extended collective licence, as an additional means, to streamline the licensing of the use in the activities of libraries, archives and museums, in areas not covered by the limitations.*

One of the problem that has not been solved is the lack of solution that would facilitate commercial uses by publishers or media companies of orphan works, found e.g. in the archives or museums. It was stated that “*a model of a specific legal / legislative solution that would cover also commercial uses was presented in 2002, but not was brought forward in the legislative process.*”

⁵⁰ Copyright Commission’s Proposal for a new Section 55a of Finnish Copyright Act. Report of the Copyright Commission 2002:5 (in Finnish).

Follow-up to the Commission Recommendation and Council conclusions

In response to the question concerning the progress on the availability of lists of known orphan works and works in the public domain, Finland answered that “*the collective management organisations in their respective fields in Finland have best available information on orphan works.*”

France

Existing mechanisms

In reply to the first questionnaire in June, France only stated that the exceptions in the legislation are compatible with the exceptions of the Copyright Directive. It means that no specific provision on orphan works exists in French copyright law.

Previous initiatives

France does not have any specific mechanism to facilitate the use of orphan works at the moment. In 22.02.2007, the ‘Commission pour la Relance de la Politique Culturelle’ proposed amendments in relation to the management of orphan works.⁵¹ The proposed solution was that of the mandatory collective management. This initiative has not had consequences so far.

Follow-up to the Commission Recommendation and Council conclusions

On 26 of June 2007, Conseil Supérieur de la Propriété Littéraire et Artistique (CSPLA) at the French Ministry of Culture and Communication decided to create a commission to work on orphan and out of print works' related problems. The Commission is focussing on how to make accessible and facilitate use of orphan works. Conclusions were to be presented at the Commission meeting on 10 April 2008.⁵²

In the final report France states as follow: “*Le Conseil supérieur de la propriété littéraire, organe consultatif placé auprès du ministre chargé de la culture, doit examiner prochainement, un projet d’avis ayant pour objet la recherche de dispositifs permettant d’améliorer la situation des oeuvres orphelines.*”

Le rapport s’attachera à définir les oeuvres orphelines, à quantifier le phénomène secteur par secteur, à établir un diagnostic par secteur et dégager si des initiatives doivent être prises tenant compte des différences de situations possibles entre les catégories d’oeuvres concernant les situations en cours et dans une perspective de prévention notamment par des mécanismes d’identification des oeuvres.

D’ores et déjà, il a été relevé que les oeuvres orphelines sont marginales dans les secteurs du cinéma, de la musique et, dans une moindre mesure, de l’audiovisuel et qu’elles sont plus nombreuses dans les secteurs de l’écrit et de l’image fixe ce qui pourrait conduire à des propositions diversifiées selon les secteurs.

Par ailleurs, le code de la propriété intellectuelle prévoit des dispositions législatives de nature à résoudre nombre de situations. L’article L. 122-9 de code de la propriété intellectuelle dispose : « En cas d’abus notoire dans l’usage ou le non-usage des droits d’exploitation de la part des représentants de l’auteur décédé visés à l’article L. 121-2, le

⁵¹ Commission pour la relance de la politique culturelles, Livre blanc pour la relance de la politique culturelle, tirage 2, 22 février 2007, <http://www.spedidam.fr/actu/doc/LivreblancCPRC.pdf>, p. 70.

⁵² Conseil Supérieur de la Propriété Littéraire et Artistique, <http://www.culture.gouv.fr/culture/cspla/index-cspla.htm>, <http://www.droitsdauteur.culture.gouv.fr/index-pla.htm>

tribunal de grande instance peut ordonner toute mesure appropriée. Il en est de même s'il y a conflit entre lesdits représentants, s'il n'y a pas d'ayant droit connu ou en cas de vacance ou de déshérence. Le tribunal peut être saisi par le ministre chargé de la culture¹ ».

L'article L. 211-2 du même code prévoit un mécanisme comparable pour les droits voisins : «Outre toute personne justifiant d'un intérêt pour agir, le ministre chargé de la culture peut saisir l'autorité judiciaire, notamment s'il n'y a pas d'ayant droit connu, ou en cas de vacance ou de déshérence ».

Il convient de ne pas assimiler l'oeuvre anonyme à l'oeuvre orpheline. A cet égard, le droit français prévoit des règles qui sont de nature à faciliter la gestion de ces oeuvres.

En vertu de l'article L. 123-3 du code de la propriété intellectuelle, les oeuvres anonymes tombent dans le domaine public soixante-dix ans suivant l'année de leur publication et peuvent alors être exploitées sans soulever les difficultés posées par les oeuvres orphelines. Si elles devaient entrer dans la catégorie des oeuvres orphelines, elles perdraient définitivement leur statut d'oeuvres anonymes. L'article L. 113-6 du même code prévoit que les auteurs d'oeuvres anonymes sont représentés dans l'exercice de leurs droits « par l'éditeur ou le publicateur originaire, tant qu'ils n'ont pas fait connaître leur identité civile et justifié de leur qualité ». Les droits attachés à ces oeuvres sont donc exercés par un représentant de l'auteur ou de ses ayants droit.”

Germany

Existing mechanisms

Germany did not provide information about existing mechanisms in relation to orphan works.

Follow-up to the Commission Recommendation and Council conclusions

The problem of orphan works is currently being dealt by the Ministry of Justice in the framework of the reform of the German copyright legislation.

Germany reported as follow: *“Die Situation stellt sich derzeit in Deutschland so dar, dass zurzeit das federführende Bundesministerium der Justiz an der Novellierung des Urheberrechts arbeitet und somit auch die Problematik der verwaisten Werke mit berücksichtigen wird. Ein Positionspapier kann daher für Deutschland zum jetzigen Zeitpunkt noch nicht zugeleitet werden. Die Generaldirektorin der Deutschen Nationalbibliothek, Frau Dr. Niggemann, wird als Mitglied der High Level Expertgroup zur EDL nach Ostern zusammen mit Vertretern des Beauftragten für Kultur und Medien sowie des Börsenvereins des deutschen Buchhandels ein weiterführendes Gespräch mit dem Bundesministerium der Justiz führen.*

Die Deutsche Nationalbibliothek ist darüber hinaus Teilnehmer des EU-Projekts ARROW, in dem auf europäischer Ebene Modelle zur Ermittlung und Verwaltung von Rechten entwickelt werden sollen.”

Greece

Existing mechanisms

There is no specific legislation in relation to orphan works in Greece. Greece simply reported that an orphan work can only be used under limitations or exceptions:

“The following general rules should be considered regarding copyright issues and national requirements for publication of cultural heritage material on an online service:

1. *if the object to be illustrated is protected by copyright law, the licence of the right holder has to be granted*
2. *contacting the competent collecting society for a category of right holders may help in identifying and contacting right holders*
3. *even if protected by copyright law, a work may be used without the authors consent in the cases described as limitations or exceptions to copyright law 2121/1993”.*

Follow-up to the Commission Recommendation and Council conclusions

Greece stated that the issue of orphan works is now on the agenda of the new Law Making Committee for the amendment of the existing Law No. 2121/1993 "Copyright, Related Rights and Cultural Matters". Greece reported that the Committee *“is examining all the possible mechanisms (creation of a database with information about the rightholders, mandatory administration by collecting societies with the collaboration of the libraries and the archives that will be in charge of the legal deposit etc.) and obviously is taking into consideration the specific provisions of the Commission Recommendation and the Council Conclusions in relation to orphan works.”*

In response to the question concerning the progress on the availability of lists of known orphan works, Greece stated that *“There has been no progress in that context, but the creation and availability of such lists is part of possible legislative measures in relation to orphan works.”*

Hungary

Existing mechanisms

“In Hungary there is no special regulation that clears the licensing of orphan works. In case of orphan works the extended collective rights management can help as well. It makes it possible for the user to acquire certain rights even if the original right holder temporarily can not be found. But with this method only those rights can be acquired that fall within collective rights management. For example publishing a film on DVD or reprinting a book can not be managed in this way”. Despite these measures Hungary provided information that cultural institutions are for the moment avoiding digitisation of orphan works.

The answer on the question 6c in the final report is as follow: *“There are existing but not complete registers from which we can get to know who the right owner is. Such register can be found in the Hungarian Patent Office which is a voluntary work-register and the collecting societies have similar registers for the sake of their own right holders. But these are basically not "orphan work registers" or "rightholder-searching" registers. The registration in these registers generates an authorship presumption, which means that until proven otherwise, authorship of a work shall be presumed to be vested in the person whose name is registered as author.”*

Follow-up to the Commission Recommendation and Council conclusions

Hungary reported that *“on the basis of the documents of the HLG and other international experience, the Hungarian Government plans for the spring of 2008 an amendment of the Copyright Act that will give more solutions for the problems of orphan works.”* This amendment will contain further rules (a specific procedure for licensing) which can help to manage the orphan works. The proposed amendments consist in inserting a new heading ‘Authorization of use in case if the author or his/her location is unknown’ and the Article 57A into the Copyright Act.

Proposal of the amendments:

57/A§.

(1) *The Hungarian Patent Office shall issue a non-exclusive, non-transferable authorization of use for at most 5 years at the request of a user, who - with the aim of concluding a license agreement of use - did all that can be expected to find the author with consideration to the type of work and mode of use concerned, and the search of the author proved to be unsuccessful.*

(2) *If the author or his/her location becomes known during the validity period of the authorization of use, the Hungarian Patent Office - at the request of the author or the user - shall revoke the authorization of use with the effect starting on the day when the author or his/her location became known, ...that the use may be continued at most for an additional period of one year after the day when the author or his/her location became known, but only at an extent available on that day."*

Paragraph 112 is supplemented with indent 6):

6) The government shall be empowered to define the detailed rules of authorization of use in case of unknown or not locatable authors"

The last point provides a possibility for the Hungarian government to deal with due diligence guidelines for the use of orphan works. The use of orphan works is foreseen in general, also in the context of digitisation and online accessibility.

Ireland

Existing mechanisms

According to the report, in Ireland *"there is no legislation existing (...) in relation to orphan works. One good practise is the use of "reasonable efforts to establish ownership"*.

Follow-up to the Commission Recommendation and Council conclusions

It was also reported that no legislation concerning orphan works is foreseen. Ireland reported that the progress to facilitate the use of orphan works is *"for consideration of the Steering Group"* and the progress on the availability of lists of known orphan works and works in the public domain it *"to be established in the survey"*.

Italy

Existing mechanisms

In reply to the questionnaire, Italy reported that *"no legislative provisions have been established so far by the Italian law for neither orphan nor out-of-print works. A European solution would be desirable and supported by our part."*

Follow-up to the Commission Recommendation and Council conclusions

In the final report, Italy provided as follow: *"The issues concerning the use of orphan works and the drafting of lists of orphan works (...) is one of the main questions in the setting up of user oriented services. A working group of experts is being set up to deal with all the related issues."* However, for the moment, only a translation into Italian of the *Report on*

Digital Preservation, Orphan Works, Out-of-Print Works. Selected Implementation Issues has been done in relation to the orphan works' issue.

In response to the question concerning the progress on the availability of lists of known orphan works, Italy gave the example of the MILE project - Metadata Image Library Exploitation (<http://www.mileproject.eu/>): *"MILE is an EC funded project that aims at improving the use, accessibility and trade of digital images throughout Europe. Among the other activities, MILE set up an 'Orphan Works Database' which acts as a repository for all Orphan Works and invites visitors to offer information about those works. This database also serves to collate all search efforts for associated works of art so that Europe is provided with a centralised source for Orphan Works discussions, search history and potential repatriation. The Italian partner is Alinari, the largest photographic national archive."*

Latvia

Existing mechanisms

Latvia provided the following information: *"Amendments to the Copyright Law on copyright exception provides for the possibility of making digital copies of the so called "orphan works" (...) and making them available on the premises of the state and municipality libraries, archives and museums as well as on expressly secure local networks. **Copyright exceptions cannot be applied for making works available on-line.** National Library of Latvia together with authors and their respective collecting societies currently are negotiating to allow out of print works together with other works to be made available on-line. **There are no obvious solutions to the problem so called "orphan works" and making them available online. Discussions on this matter still continue.** Currently in the digitisation process the preference is given to physically endangered documents, documents of high cultural or historical value and documents of high demand. The lists of objects within a specific digitisation project are submitted to collecting societies thus determining their availability without any restrictions."*

Follow-up to the Commission Recommendation and Council conclusions

Latvia reported as follow: *"On November 20th 2007 the National Library of Latvia in cooperation with the Ministry of Culture organized the international round table and discussion "Digital library and copyright" which was the time when all stakeholders discussed an EC recommendations on copyright issues. This event served as a platform to share best practices and discuss possible solutions regarding orphan works and out-of-print works."*

Lithuania

Existing mechanisms

For the present, Lithuania has neither legislation nor mechanism to facilitate digitisation and online access of orphan works. Lithuania underlines that there are no established mechanisms to facilitate digitisation of orphan works because there are no problem as such. The main arguments are that first, *"multiple copying for non-commercial teaching and scientific research purposes, for the purpose of preservation or replacement of a lost, not for direct or indirect commercial advantage is possible without the authorisation of the author or other owner of copyright."* and second, *"memory institutions are oriented to*

digitise old Lithuanian documents and objects which time of author's economic rights are passed. Such valuable documents and objects we have a huge deposit.”

Follow-up to the Commission Recommendation and Council conclusions

“In December Ministry of Culture of the Republic of Lithuania organised discussions between jurists and specialist from cultural institutions regarding the use of orphan works in the context of digitisation and online accessibility.” The conclusion of the discussion was that: *“To make changes in the Law on Copyright and Related Rights (the provisions of this Law are harmonised with the legal acts of the European Union) at the moment is economically disadvantageous.”*

Lithuania explains then as follow: *“The problem of orphan works and out of prints works is not big in Lithuania on practical level. To establish the author of an orphan work, claimants usually approach the Authors’ Rights Section of the Ministry of Culture. The section explores its available channels to identify the author or copyright holders of the given work. Being a small state, Lithuania does not have a big amount of orphan works. A survey of major memory institutions – the implementers of digitalization projects – has revealed that none of them has yet encountered any orphan works. It is difficult to say whether such exist in Lithuania at all: even if they do, they represent only individual instances. The Ministry of Culture held a meeting with the specialists of digitalization and authors’ rights to discuss the problem. The decision was that since Lithuanian digitalization institutions do not encounter this problem on systematic basis, at present moment it would not be an efficient economic decision to alter provisions in the law regarding the digitalization and public access of orphan works.”*

It was underlined however that *“in the future we are opened and able to make all changes in our legislative if it will be necessary.”*

Luxembourg

In relation to the issue of orphan works, Luxembourg did not provide information neither about existing mechanisms (if any) nor any foreseen actions. Luxembourg has only stated that *“In Q3 of 2008, machine readable metadata for public domain works will be deployed, based on the Open Access Data Protocol from the Science Commons project. This should ultimately enrich the indexes of search engines with information on public domain works. There is no such project yet for orphan works. Because of the small size of the Luxembourg publishing industry, there is a need for a European solution.”*

Malta

Existing mechanisms

No specific legislation for orphan works exists at the moment in Malta. Malta informed that currently priority is given to digitisation and digital preservation of publicly-held cultural goods that require urgent attention. A number of initiatives in the field of online access and digitisation of cultural objects have recently been launched, *e.g.*: (a) creating an IT system to manage and disseminate data concerning cultural heritage, designed to cater for the inventory of both movable and immovable cultural heritage property (CHIMS, Cultural Heritage Inventory Management System); or (b) compiling an online database of Maltese Books in Print by the sub-committee of the National Book Council. Malta is arguing that: *“While not specifically targeting orphan works, these initiatives are setting the trend for best*

practice digitisation initiatives on a national scale while also setting up a number of platforms which can then be utilised for specific projects aimed at orphan works.”

Follow-up to the Commission Recommendation and Council conclusions

Malta stated as follow: *“While no regulations or guidelines are yet in place in Malta to implement the specific provisions of the Commission Recommendation and the Council Conclusions in relation to Orphan works in the specifies areas (text, music / sound, visual / photography, audio-visual), it is envisaged that the combined efforts of the various actors in this field will provide the basic tools for a focused national approach to the issues raised on orphan works at a European level.”*

The Netherlands

Existing mechanisms

The Netherlands did not provide information concerning existing mechanisms facilitating use of orphan works the issue of orphan works.

Previous initiatives

The Netherlands provide information about previous initiatives in the field of orphan works. *“In 2006 the Taskforce Archives published in cooperation with the Dutch Museum Association a guide on legal problems for Archives and Museums. In these guidelines attention is paid to orphan works and the research which is done in this field. Furthermore a lot of best practices are presented. For the audiovisual domain a specific project has started that will result in: - an inventory of copyright and copyright ownership; - a fund where licensing fees for remaining unknown rightsholders will be deposited.*

The legal commission of the Dutch library organisation FOBID has looked into ways to achieve a national/collective solution for orphan works, which will also be valid for museums and archives. September 2007 a presentation was given at the meeting of the HLEG “10 building blocks” for an agreement between libraries, archives, museums and other cultural and educational institutions on the one hand and various collecting societies on the other hand.⁵³ The stakeholders in the discussion on legislation and digitisation stress the importance of solutions for the problems institutes encounter in mass digitisation projects. Recently a quickscan was carried by FOBID out on image databases; resulting in 10 rules for usage of imagedatabases.”

Follow-up to the Commission Recommendation and Council conclusions

What concerns a question about the lists of known orphan works, the Netherlands answered: *“Key issue of orphan works is, especially in the situation of massdigitisation, that the search for rightsholders is very time consuming and expensive. At present there is no national inventory available of known orphan works. We are working on the assumption that existing foreign (such as made by the British Library) estimates, also apply to the Dutch library collections. The focus is on finding practical solutions, as proposed by FOBID (mentioned above by item 6a) for example.*

- ICN – created an inventory of 2500 research reports in order to digitise them.
- Especially with respect to digitisation of newspapers a solution – in terms of a general agreement with publishers is in the process of being made by the Koninklijke Bibliotheek and supported by the ministry.

⁵³ <http://www.sitegenerator.bibliotheek.nl/fobid/img/docs/orphan%20works.pdf>

Poland

Existing mechanisms

In relation to the orphan works' issue, Poland reported as follow: *“In Poland up to now there are no mechanisms or official statements to facilitate the use of orphan works. But common approach in the digital libraries is to allow users to use digital copies of orphan works without permission after a reasonable enquiry to identify and locate the copyright owner, led by the digital librarians.”*

Poland stated as follow: *“From a legal and an economic point of view orphan works cannot be neglected. Polish cultural institutions need a copyright legislation which is more friendly to the legitimate interest of the public and which is really supporting the public domain as a main source of creativity.”*

Poland stated also that *“Polish memory institutions realise that digitisation and making available of digital works must not undermine the right of the creators or the commercial sustainability of the publishing industry. Reasonable solution could be for national copyright legislation to establish a basis for licensing mechanisms, e.g. the law might require that before this kind of digital material is published, reasonable efforts must be made to identify copyright owners.*

In projects of academic and high schools libraries, obtaining copyright clearance for book and journals' articles is a bigger problem than technical issues of image capture. New copyright to harmonise legislation between EC member states pose some problems for identifying copyright owners and digitisation of local studies material. This must be taken into account in all Polish digital libraries when assessing collections for digitisation.”

Follow-up to the Commission Recommendation and Council conclusions

Poland stated that *“ideas and proposals for improving legal conditions for digitisation, accessibility and preservation is the important field of Committee for Digitisation activity.”* Up till now nothing has been done that could lead to improve the use of orphan works in future. Poland reported that in 2007 there was no progress in the area of creating lists of known orphan works. However, Poland stated also that *“in November Committee for Digitisation convened the working group on copyright to define a strategy for dealing with copyright issues in relation to digital materials.”*

Portugal

Existing mechanisms

In the first questionnaire it was stated that *“no measures has been taken regarding orphan works.”* Portugal also reported that *“no significant practical actions have been carried out since June, due to a major reorganization of the civil service in Portugal.”*

The answer to the question as to whether ‘any best practices concerning the use of orphan works in the context of digitisation and online accessibility exist in Portugal’, was as follows: *“As far as we are aware there are no such best practices in our country.”*

Follow-up to the Commission Recommendation and Council conclusions

Portugal provided that *“there are plans for joint work among the National Library of Portugal (BNP), the Directorate-General of the Portuguese Archives (DGARQ) and The Institute for the Portuguese Museums and Conservation (IMC), towards among others the organization of a common programme of short open seminars on IPR issues and that a working group is being established to foster activities in these aspects.”* It is foreseen that *“in*

2008 there will be conditions to start actual work in these lines of action.” The working group is still being organised and will probably start working on an informal basis first.

On the question concerning plans to discuss issues related to the use of orphan works, Portugal stated: “*we are interested in the matter, but it is not for the moment among our priorities. Our institutions are primarily concerned about public domain, unique/antique heritage materials which raise little questions at that level.*” In relation to developing any sector-specific due diligence guidelines for the use of orphan works, Portugal replied as follow: “*It is not yet planned; but could be very useful to get knowledge of European experiences regarding certain types of 20th century materials such as photographs and unpublished audiovisual materials.*”

Romania

Existing mechanisms

The Romanian Institute for Cultural Memory, Institutul de Memorie Culturala (CIMEC) have digitised and (re)published on their website some orphan works. However, no existing mechanism to facilitate the use of orphan works was mentioned.

Follow-up to the Commission Recommendation and Council conclusions

As reported by Romania, the Ministry of Culture and Religious Affairs (MoCRA), following the Recommendation of the European Commission and the Council Conclusions, launched a wide consultation process on the digitisation of cultural resources and the creation of the Romanian Digital Library. One of the objectives was to identify a mechanism that could facilitate the use of orphan works and to establish lists of known orphan works and works in the public domain. Consultations between the Ministry, the Romanian Copyright Office, the National Library and Collective Management Societies on, amongst others, aspects concerning orphan works and out of print works in relation to the Copyright Act, Law no 8/1996) are under way. The results have been incorporated in the Public Policy Proposal (PPP). As mentioned in the PPP, the Copyright Office and the collective rights societies will work together to find viable solutions to resolve issues related to orphan works and out of print works.⁵⁴

Although the discussion on the orphan works’ issue is ongoing, no solution has been chosen yet to solve the problem. They also reported that “*the discussions are still not formalised (in writing)*” and that they are expecting some guidelines from the HLG. Romania reported that “*Following consultations organised both by the Ministry of Culture and Religious Affairs, as well as the Romanian Copyright Office with regard to the issue of orphan works, amendments to the Copyright Law were suggested. Further consultation will follow.*” This statement was made also in relation to the progress on availability of lists of known orphan works.

⁵⁴ The stakeholders consulted during the drafting of the PPP were: the National Library of Romania, the Institute for Cultural Memory (CIMEC), the National Centre of Cinematography, the National Film Archive and the Directorate for Museums, Collections and Governmental Granting within MoCRA. The consultation process focused on identification of: (a) problems and solutions for digitisation of cultural resources on each thematic pillar (documentary written heritage, movable heritage, audio-visual heritage, unmovable heritage, archives heritage); (b) optimal solutions for digitisation on each specific thematic pillar and proposals for stages of implementation; (c) specific cultural material already digitised; (d) of social and economic impact digitisation will have on each thematic pillar; (e) a representative corpus of cultural material to be digitised (criteria, stages, concrete examples). Once approved, the Public Policy Proposal will constitute the basis of a multi-annual programme (7 years) for the digitisation of cultural resources and the creation of the Digital Library of Romania, programme that will be enforced by a Government Decision.

Slovakia

Existing mechanisms

According to Slovakia, the situation in the area of orphan works is quite problematic. Slovakia reported that *“our cultural institutions are avoiding this problem, they provide access only to those digitized objects that are „solved“ from the point of Property Rights’ view. There is no specific legislative dealing with this problem. Some institutions, however, (e.g. Slovak National Library) are preparing special database of Property Rights Holders where they link Orphan Works to the Unknown holder and make special database of this works.”*

Follow-up to the Commission Recommendation and Council conclusions

However, even though Slovakia was not undertaken any steps so far, some action in this field is foreseen. It was reported as follow: *“We are going to prepare the concept of new Copyright Law, where the Orphan Works will be added to current legislative, but the whole process is on the beginning. As for specific sector-specific due diligence guidelines, we will be happy to do it, but in this stage of progress we need the discussion first. The discussion about use of Orphan Works is about to begin. We hope that this problem will be discussed and legislatively maintained during the year 2008.”*

Finally Slovakia confirmed that further actions will be undertaken in this area. Slovakia reported that *“in 2008 creation of a working group for research of the "orphan works" issues is envisaged in the Slovak Republic, which will build on the results of the respective working groups of CENL and FEP, in order to deal with these issues in Slovakia. The working group must work effectively and quickly. Through the Central Library Board, pressure must be exerted in order to achieve an amendment of the Copyright Act, where all issues related with orphan works will be incorporated.”*

What concerns the progress on the availability of list of orphan works, Slovakia stated as follow: *“In the light of creating a pan-European clearing house for copyright is seen in international projects (such as ARROW).”*

Slovenia

Existing mechanisms

Slovenia reported that the issue of orphan works is not widely recognised in Slovenia as a big problem and that there are no experiences in this area as yet. Slovenia reported as follow: *“Problems related to orphan works are almost non-existent in Slovenian practice. Users of copyrighted material most often than not refrain from using of copyrighted works due to the unknown author and thus unattainable copyright agreements. The possibility of the copyright owner taking legal action against them is very remote. That is clearly shown by the negligible amount of disputes in these area, as shown in statistical report of the District court in Ljubljana (the court is specifically appointed as the only first instance court in Slovenia to deal with intellectual property lawsuits). Different factors are believed to influence such behavior ranging from low authors or other copyright holders awareness of their options for legal remedies to the protracted and costly court proceedings (in complicated cases in average taking more than 12 months) and relatively low prescribed sanctions for such violations. These sanctions are primarily limited to the compensation of damages, while the civil penalty (double amount of the usual authors’ fee) is provided only for the cases of intentional violations or gross negligence cases.”*

Follow-up to the Commission Recommendation and Council conclusions

Although orphan works do not constitute serious problem, it was stated that Slovenia suggest and support actions in this field at the EU level. As to the question about the progress on the availability of lists of known orphan works and works in the public domain, Slovenia provided as follow: *“The significant progress we are expecting within the project proposed to be financed within eContentPlus framework call in 2007. Slovenia is also a partner of the project. The delivered infrastructure will include the creation of a European distributed registry of orphan works and a network of clearance centres for out of print works.”*

Spain

Existing mechanisms

Spain did not provide information about existing mechanisms facilitating the use of orphan works.

Follow-up to the Commission Recommendation and Council conclusions

In June, Spain reported that the work of *The Spanish Commission on digitalisation and on-line accessibility of cultural material and digital preservation* at the Ministry Culture has just begun. At present, problems related to copyrights in the context of digitisation of cultural material are being examined. In the second questionnaire it was stated as follow: *“The Spanish Commission on digitalisation and on-line accessibility of cultural material and digital preservation at the Ministry Culture has celebrated its first meeting in order to create a coordinate action regarding to digitalisation. Two sub-commissions have been created, both of them led by the National Library. The first one must developed the National Plan for digitalisation. It will contain the following points: Analysis of the current situation, Best practises, Standards, Design of a common strategy of digitalisation and dissemination. The second one is in charge of studying the legal and political subjects related to digitalisation, that is: Copyright, Partnership between public and private sector, Information Literacy, Legislation, Relation with the citizenship. The final document will be finished at the end of February.”*

In the final report it was only stated that *“The National Library of Spain is going to participate in a European Project (ARROW) that is going to study the way of identifying and sharing the information about the orphan material.”*

Sweden

Existing mechanisms

Sweden reported as follow: *“In Sweden there are no legal initiatives taken concerning orphan works. However – as in the other Nordic countries – some of the problems regarding orphan works have been solved by the use of extended collective licenses. This technique is also used in other countries and is further described under section 4.5 in the “EUROPEAN DIGITAL LIBRARY INITIATIVE High Level Expert Group (HLG) – Copyright Subgroup Interim Report (16.10.06)”*. An extended collective license applies to the exploitation of works in a specific manner, when an agreement has been concluded concerning such exploitation of works with an organization representing a substantial number of Swedish authors in the field concerned. It was however mentioned that *“the “extended collective licence” (ECL) provision in Sweden and other Nordic countries may give quite a bit of freedom for users to publish or*

otherwise utilise works with doubtful rights conditions. (...) in practice, ECLs are rarely used, but are however a support to fall back on if necessary.”

Follow-up to the Commission Recommendation and Council conclusions

In relation to the follow-up to the Commission Recommendation and Council conclusions, Sweden provided as follow: *“The question of orphan works has to some extent been discussed by the institutions involved with the EDL project in Sweden. But orphan works will probably be more of an issue when digitisation of photos and other materials that are normally connected to an identified right holder increase. Furthermore, the Coordinator for the Museum Sector, mentioned above, will probably look in to this question from the point of view of the museums. The intent is to clarify the situation and to identify to what extent issues like these are relevant to the work carried out in the sector.*

The Association of Swedish Professional Photographers has already started a series of seminars about EDL and its implication for IPR related issues. The Swedish associations for publishers and for textbooks and teaching aids have also started discussions firstly with the National Library.”

United Kingdom

Existing mechanisms

The UK Act foresees possibilities to use orphan material in certain cases. For instance the Copyright Tribunal may give consent to a person making a recording from a previous recording of a performance where the identity and whereabouts of a performer cannot be ascertained by reasonable inquiry (s. 190 of the UK Act).⁵⁵ However, the scope and application of this provision is very limited.

In 2006, the British Screen Advisory Council (BSAC) presented a draft of a legal solution for orphan works for UK law. The solution consisted in a statutory limitation or exception to copyright.⁵⁶

Follow-up to the Commission Recommendation and Council conclusions

United Kingdom reported that the UK Government has reviewed Copyright legislation and has accepted all the recommendations of the Gowers Review. In the Gowers Review, the need for an action at European level is strongly underlined. Also the UK report points out that *“this proposes recommending an ‘orphan works’ provision to the European Commission”*. At present, the UK Government Intellectual Property Office is considering how to implement this provision and is monitoring the work of the EDL High Level Group Copyright Group work on developing due diligence guidelines for Orphan Works. It was provided that a number of key UK stakeholders are also participating in this activity.

In relation to a question on the progress on the availability of lists of known orphan works and works in the public domain, the UK states as follow: *“Substantial progress in this area will follow from the work of the EDL Working Group on due diligence for Orphan Works.”*

⁵⁵ See chapter I point 2.2 of this Report.

2. Summary

The majority of Member States do not have mechanisms that would enable use of orphan works in the context of digitization and online accessibility. That is why the Commission Recommendation encourages them to take appropriate action in this field.

The situation of legislation as well as the approach and actions undertaken in relation to the problem of orphan works differs greatly in Member States. Some countries started acting in this field by launching consultation processes, initiating discussions or organising meetings and conferences, while others did not undertake any actions in relation to orphan works. In both cases, their arguments and conclusions were of a different nature:

- some countries considered this problem to be irrelevant in their country, arguing that orphan works are ‘isolated cases’ and do not foresee any further action;
- others identified the problem but found that the main priority for their country is to firstly provide the digitisation of cultural material that remains in public domain;
- some Member States do not know how to handle the problem, though consider it relevant;
- some countries already have mechanism that enable use of orphan works and do not foresee the introduction of additional measures;
- in a few countries the consultation process is underway;
- finally some Member States are already drafting amendments or have just submitted proposals.

The most advanced Member States in this area are Denmark and Hungary. Denmark has chosen to strengthen the ECL system, while Hungary opted for the ‘non-exclusive licence’ solution. In addition, four Member States are drafting amendments (the UK, Romania, Estonia and Germany) and in three others (France, Belgium and the Czech Republic) consultation processes are underway.

Furthermore, Member States on different occasions have expressed their interest to have further support from the European Commission in dealing with orphan works and have underlined that a European-wide solution would be desirable.

⁵⁶ See chapter I point 2.3 of this Report.

V. Conclusions

Orphan works constitute a serious problem for both institutions and stakeholders. Without the consent of the copyright owners, such works might not be digitised and otherwise exploited, including the provision of online access thereto. This situation could be to the detriment not only of the stakeholders and institutions but generally speaking of the public. Taking into consideration the scope of this problem, the solution for orphan works needs to be found in the relatively short term.

Cultural institutions are particularly interested in solving this problem because in most cases it is they who carry out digitisation of the cultural heritage. Without the legal certainty, cultural institutions will be reluctant to digitise orphan material due to the high risk of paying damages in case the right holder reappears and sues them. Also, for other main actors, finding a suitable solution remains a priority. For CMOs (as well as cultural institutions) having legal certainty while dealing with orphan material would significantly facilitate the management of such works. As for stakeholders – they would be assured that copyrights are respected.

The European Commission is widely promoting digitisation and online accessibility of European cultural heritage. Towards this goal, the *Commission Recommendation on digitisation and online accessibility of cultural material and digital preservation* encourages Member States to solve the problem of orphan works at national level and after consultation with relevant stakeholders. The Commission coordinates actions undertaken by Member States in this field. Apart from this, the European Commission has initiated a European-wide discussion between stakeholders and institutions with the aim of discussing possible solutions for orphan works. In particular, work on due diligence criteria for the search of right holders is ongoing for each of four sectors: text, music/sound, visual/photography and audiovisual.

Main institutions and stakeholders are involved in working on this problem at different levels. Not only do they participate in the work initiated by the European Commission (concerning establishing due diligence sector-specific search criteria for right holders) but they also act independently. Their actions are of a different nature, scope and application. Due to the lack of national legislation, cultural and collective management institutions facing the problem of orphan works may try to introduce, by contractual agreements, some working practices, or, failing this, they might simply be tempted to avoid the problem altogether. Sometimes, they undertake voluntary actions in order to find suitable solutions for themselves on how to deal with orphan works. By establishing their positions and negotiating common statements, they contribute to the general discussion, taking the opportunity to inspire one another in finding the best solution.

Although cultural institutions, collective societies and stakeholders undertake some actions, there is a growing expectation that some sort of mechanism should be introduced by Member States, especially since the Commission Recommendation recommends taking steps to introduce mechanisms or otherwise facilitate use of orphan works. As observed in chapter IV, the level and scope of Member States' actions is highly differentiated. While some Member States are quite advanced in the consultation or drafting process in relation to orphan works, others do not foresee any measures for coping with this issue in the future. Some countries are reluctant to take any step unless there is a further initiative at European level or they receive support or guidelines. But even those Member States which are drafting amendments can in certain cases have difficulties in introducing them into their legislation. One example is when Member States would like to introduce a new limitation or exception to copyright. In such a case, to enable introducing such a measure, the European Commission would have to take steps to provide amendments to the Copyright Directive, for instance, by providing Member States with the possibility of introducing in national legislation an exception or limitation to copyright concerning the use of orphan works by libraries and

cultural establishments as proposed by the Gowers Review⁵⁷. Another option would be to introduce an explicit exception concerning the use of orphan works to the Copyright Directive.

The idea is that once digitised and made available online in one Member State, after fulfilling commonly agreed principles and due diligence criteria for search of right holders, orphan works would be accessible in all other countries within the European Union. It is therefore essential that mechanisms adopted by Member States are interoperable and that there is a system of mutual recognition of adopted solutions between countries. In the case where Member States do not foresee to undertake any steps to create a mechanism for use of orphan works, it would not be possible to achieve interoperability within the EU. In such a situation it would be necessary to implement a mechanism enabling the use of orphan works at European level. This would require undertaking other actions in order to harmonise national solutions and provide Member States with a suitable mechanism for the use of orphan works.

⁵⁷ See Gowers Review of Intellectual Property
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Annex 1. Table on Member States' actions

State	Existing legislation	Undertaken actions	Foreseen actions	Others	No information
Austria	Orphan works are handled as out-of-print works.			If the Commission intends to set an initiative, Austria would be interested.	
Belgium		Consultations are under way.			
Bulgaria					No information.
Cyprus			Nothing is foreseen. Only one example of an orphan book is known.		
Czech Republic		Discussions and consultations on orphan works have been initiated.	Further discussions and consultations are foreseen.	The Czech Republic would be interested in further and more detailed recommendations and proposals prepared by the Copyright Subgroup of the HLG.	
Denmark	Extended Collective Licensing	A revision of copyright law was proposed. New provisions will broaden the ECL application and will contribute to solve the problem of orphan works. The new law comes into force 1.07.2008.			
Estonia		Consultations aimed at introducing a mechanism to facilitate online access to orphan works are under way.	Amendments to Copyright Act are foreseen for 2008-2009.		
Finland	Extended Collective Licensing		Nothing is foreseen due to the existing Extended Collective Licensing system.		

State	Existing legislation	Undertaken actions	Foreseen actions	Others	No information
France		The French Ministry of Culture and Communication has recently established a commission that is currently working on orphan and out of print works			
Germany		The problem of orphan works is currently being dealt by the Ministry of Justice in the framework of the reform of the German copyright legislation (3 rd basket).			
Greece			Nothing is foreseen. Orphan works can only be used under existing exceptions or limitations to copyright.		
Hungary	Extended Collective Licensing	Hungary prepared a new proposal under which the Patent Office shall issue a non-exclusive authorisation to use of orphan works. The government could issue further detailed rules.			
Ireland		Nothing has been undertaken.	No action is foreseen.		
Italy		Nothing has been undertaken.		European-wide solution would be desirable and supported.	
Latvia		An international 'round table' discussion was organised.			
Lithuania			Nothing is foreseen due to the fact that there is no problem as such (orphan works are only 'isolated cases').		

State	Existing legislation	Undertaken actions	Foreseen actions	Others	No information
Luxemburg					No information
Malta			Nothing is foreseen so far, priority was given to digitisation of material in public domain.		
The Netherlands					No information
Poland		Nothing has been undertaken (difficult to handle the problem).			
Portugal			Orphan works is an interesting issue but priority was given to the public domain material. Only a general discussion on IPR issues is foreseen.	It could be useful to get knowledge of European experience regarding certain types of 20 th century material such as photographs and unpublished audiovisual material	
Romania		Consultations to identify mechanism to facilitate use of orphan works are under way (difficult to handle the problem).		Romania would be interested in guidelines from the HLG.	
Slovakia			New solution to orphan works is to be prepared. The discussion about use of orphan works is about to begin.		
Slovenia			Nothing is foreseen as the issue of orphan works is not widely recognised as a big problem.	support actions in this field at the EU level	

State	Existing legislation	Undertaken actions	Foreseen actions	Others	No information
Spain		The Ministry of Culture has recently established Commission on digitalisation and on-line accessibility of cultural material and digital preservation	One of the sub-commission will deal with legal aspects of digitisation, among others copyright related issues.		
Sweden	Extended Collective Licensing		Nothing is foreseen due to the existing Extended Collective Licensing system.		
United Kingdom	Provisions concerning use of orphan works exist in relation to sound recordings.		The UK Intellectual Property Office is preparing the implementation of the UK Government Gowers Review of IP. This has been delayed and will now take place in 2008.		

Annex 2. Canadian Copyright Act, art. 77-78

Owners Who Cannot be Located

77. (1) Where, on application to the Board by a person who wishes to obtain a licence to use

- (a) a published work,
- (b) a fixation of a performer's performance,
- (c) a published sound recording, or
- (d) a fixation of a communication signal

in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be.

(2) A licence issued under subsection (1) is non-exclusive and is subject to such terms and conditions as the Board may establish.

(3) The owner of a copyright may, not later than five years after the expiration of a licence issued pursuant to subsection (1) in respect of the copyright, collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

(4) The Copyright Board may make regulations governing the issuance of licences under subsection (1).

1997, c. 24, s. 50.

Compensation for Acts Done Before Recognition of Copyright or Moral Rights

78. (1) Subject to subsection (2), for the purposes of subsections 32.4(2), 32.5(2) and 33(2), the Board may, on application by any of the parties referred to in one of those provisions, determine the amount of the compensation referred to in that provision that the Board considers reasonable, having regard to all the circumstances, including any judgment of a court in an action between the parties for the enforcement of a right mentioned in subsection 32.4(3) or 32.5(3).

(2) The Board shall not

(a) proceed with an application under subsection (1) where a notice is filed with the Board that an agreement regarding the matters in issue has been reached; or

(b) where a court action between the parties for enforcement of a right referred to in subsection 32.4(3) or 32.5(3), as the case may be, has been commenced, continue with an application under subsection (1) until the court action is finally concluded.

(3) Where the Board proceeds with an application under subsection (1), it may, for the purpose of avoiding serious prejudice to any party, make an interim order requiring a party to refrain from doing any act described in the order until the determination of compensation is made under subsection (1).

1997, c. 24, s. 50.

<http://www.cb-cda.gc.ca/info/act-e.html#rid-33751>

Annex 3. Proposal of the American legislation

109th CONGRESS
2d Session
H. R. 5439

To amend title 17, United States Code, to provide for limitation of remedies in cases in which the copyright owner cannot be located, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES May 22, 2006

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to provide for limitation of remedies in cases in which the copyright owner cannot be located, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Orphan Works Act of 2006'.

SEC. 2. LIMITATION ON REMEDIES IN CASES INVOLVING ORPHAN WORKS.

(a) Limitation on Remedies- Chapter 5 of title 17, United States Code, is amended by adding at the end the following new section:

`Sec. 514. Limitation on remedies in cases involving orphan works

`(a) Limitation on Remedies-

`(1) CONDITIONS- Notwithstanding sections 502 through 505, in an action brought under this title for infringement of copyright in a work, the remedies for infringement shall be limited under subsection (b) if the infringer sustains the burden of proving, and the court finds, that--

`(A) before the infringing use of the work began, the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement of the work--

`(i) performed and documented a reasonably diligent search in good faith to locate the owner of the infringed copyright; but

`(ii) was unable to locate the owner; and

`(B) the infringing use of the work provided attribution, in a manner reasonable under the circumstances, to the author and owner of the copyright, if known with a reasonable degree of certainty based on information obtained in performing the reasonably diligent search.

`(2) DEFINITIONS; REQUIREMENTS FOR SEARCHES-

`(A) OWNER OF INFRINGED COPYRIGHT- For purposes of paragraph (1), the 'owner' of an infringed copyright in a work is the legal or beneficial owner of, or any party with authority to grant or license, an exclusive right under section 106 applicable to the infringement.

`(B) REQUIREMENTS FOR REASONABLY DILIGENT SEARCH-

`(i) For purposes of paragraph (1), a search to locate the owner of an infringed copyright in a work--

`(I) is 'reasonably diligent' only if it includes steps that are reasonable under the circumstances to locate that owner in order to obtain permission for the use of the work; and

`(II) is not 'reasonably diligent' solely by reference to the lack of identifying information with respect to the copyright on the copy or phonorecord of the work.

`(ii) The steps referred to in clause (i)(I) shall ordinarily include, at a minimum, review of the information maintained by the Register of Copyrights under subparagraph (C).

`(iii) A reasonably diligent search includes the use of reasonably available expert assistance and reasonably available technology, which may include, if reasonable under the circumstances, resources for which a charge or subscription fee is imposed.

`(C) INFORMATION TO GUIDE SEARCHES- The Register of Copyrights shall receive, maintain, and make available to the public, including through the Internet, information from authoritative sources, such as industry guidelines, statements of best practices, and other relevant documents, that is designed to assist users in conducting and documenting a reasonably diligent search under this subsection. Such information may include--

`(i) the records of the Copyright Office that are relevant to identifying and locating copyright owners;

`(ii) other sources of copyright ownership information reasonably available to users;

`(iii) methods to identify copyright ownership information associated with a work;

`(iv) sources of reasonably available technology tools and reasonably available expert assistance; and

`(v) best practices for documenting a reasonably diligent search.

`(b) Limitations on Remedies- The limitations on remedies in a case to which subsection (a) applies are the following:

`(1) MONETARY RELIEF-

`(A) GENERAL RULE- Subject to subparagraph (B), an award for monetary relief (including actual damages, statutory damages, costs, and attorney's fees) may not be made, other than an order requiring the infringer to pay reasonable compensation for the use of the infringed work.

`(B) EXCEPTIONS-

`(i) An order requiring the infringer to pay reasonable compensation for the use of the infringed work may not be made under subparagraph (A) if--

`(I) the infringement is performed without any purpose of direct or indirect commercial advantage and primarily for a charitable, religious, scholarly, or educational purpose, and

`(II) the infringer ceases the infringement expeditiously after receiving notice of the claim for infringement,

unless the copyright owner proves, and the court finds, that the infringer has earned proceeds directly attributable to the infringement.

`(ii) If the infringer fails to negotiate in good faith with the owner of the infringed work regarding the amount of reasonable compensation for the use of the infringed work, the court may award full costs, including a reasonable attorney's fee, against the infringer under section 505, subject to section 412.

`(2) INJUNCTIVE RELIEF-

`(A) GENERAL RULE- Subject to subparagraph (B), the court may impose injunctive relief to prevent or restrain the infringing use, except that, if the infringer has met the requirements of subsection (a), the relief shall, to the extent practicable, account for any harm that the relief would cause the infringer due to its reliance on having performed a reasonably diligent search under subsection (a).

`(B) SPECIAL RULE FOR NEW WORKS- In a case in which the infringer recasts, transforms, adapts, or integrates the infringed work with the infringer's original expression in a new work of authorship, the court may not, in granting injunctive relief, restrain the infringer's continued preparation or use of that new work, if the infringer--

`(i) pays reasonable compensation to the owner of the infringed copyright for the use of the infringed work; and

`(ii) provides attribution to the owner of the infringed copyright in a manner that the court determines is reasonable under the circumstances.

`(C) TREATMENT OF PARTIES NOT SUBJECT TO SUIT- The limitations on remedies under this paragraph shall not be available to an infringer that asserts in an action under section 501(b) that neither it nor its representative acting in an official capacity is subject to

suit in Federal court for an award of damages to the copyright owner under section 504, unless the court finds that such infringer has--

`(i) complied with the requirements of subsection (a) of this section;

`(ii) made a good faith offer of compensation that was rejected by the copyright owner; and

`(iii) affirmed in writing its willingness to pay such compensation to the copyright owner upon the determination by the court that such compensation was reasonable under paragraph (3) of this subsection.

`(D) CONSTRUCTION- Nothing in subparagraph (C) shall be deemed to authorize or require, and no action taken pursuant to subparagraph (C) shall be deemed to constitute, an award of damages by the court against the infringer.

`(E) RIGHTS AND PRIVILEGES NOT WAIVED- No action taken by an infringer pursuant to subparagraph (C) shall be deemed to waive any right or privilege that, as a matter of law, protects such infringer from being subject to suit in Federal court for an award of damages to the copyright owner under section 504.

`(3) REASONABLE COMPENSATION- In establishing reasonable compensation under paragraph (1) or (2), the owner of the infringed copyright has the burden of establishing the amount on which a reasonable willing buyer and a reasonable willing seller in the positions of the owner and the infringer would have agreed with respect to the infringing use of the work immediately before the infringement began.

`(c) Preservation of Other Rights, Limitations, and Defense- This section does not affect any right, limitation, or defense to copyright infringement, including fair use, under this title. If another provision of this title provides for a statutory license when the copyright owner cannot be located, that provision applies in lieu of this section.

`(d) Copyright for Derivative Works- Notwithstanding section 103(a), the infringing use of a work in accordance with this section shall not limit or affect the copyright protection for a work that uses the infringed work.'

(b) Conforming Amendment- The table of sections for chapter 5 of title 17, United States Code, is amended by adding at the end the following new item:

'514. Limitation on remedies in cases involving orphan works'.

(c) Effective Date- The amendments made by this section shall apply only to infringing uses that commence on or after June 1, 2008.

SEC. 3. REPORT TO CONGRESS ON AMENDMENTS.

The Register of Copyrights shall, not later than December 12, 2014, report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on the implementation and effects of the amendments made by section 2, including any recommendations for legislative changes that the Register considers appropriate.

SEC. 4. INQUIRY ON REMEDIES FOR SMALL COPYRIGHT CLAIMS.

(a) In General- The Register of Copyrights shall conduct an inquiry with respect to remedies for copyright infringement claims seeking limited amounts of monetary relief, including consideration of alternatives to disputes currently heard in the United States district courts. The inquiry shall cover infringement claims to which section 514 of title 17, United States Code (as added by section 2 of this Act), apply, and other infringement claims under title 17, United States Code.

(b) Procedures- The Register of Copyrights shall publish notice of the inquiry under subsection (a), providing a period during which interested persons may submit comments on the inquiry, and an opportunity for interested persons to participate in public roundtables on the inquiry. The Register shall hold the public roundtables at such times as the Register considers appropriate.

(c) Report to Congress- The Register of Copyrights shall, not later than 1 year after the date of the enactment of this Act, prepare and submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the inquiry conducted under this section, including such recommendations that the Register considers appropriate.