

SECTOR-SPECIFIC GUIDELINES ON DUE DILIGENCE CRITERIA FOR ORPHAN WORKS

Joint Report

1. General matters

1.1. Context and goal of the guidelines

Context

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

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

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

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

Sector Specific Working Groups

The Commission followed the conclusion from the Stakeholder Conference and invited representatives from cultural institutions and the creative sectors to take part in four sector specific working groups ("WGs") (text, audiovisual, visual/photography and music/sound) with the mandate to develop such guidelines for their respective sectors. The goal was to create a set of guidelines for cultural institutions seeking to find rightholders of works that might be orphan.

The WGs report to the Commission and the High Level Expert Group. The WGs are composed of representatives of rightholders and cultural institutions of their respective sector and have one or two chairpersons each. An overall coordinator (Tarja Koskinen-Olsson, member of the High Level

Expert Group and the Copyright Subgroup, assisted by Franziska Schulze of IFRRO) is tasked to ensure the cohesiveness of the guidelines.

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

Goal

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

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

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

While it is recognised that non European material is of importance to cultural institutions, these guidelines were drafted for the particular needs of European material.

Case studies of measures taken in Member States exist at this stage from the text and visual/photography sectors and they are to be published separately (and updated/complemented); further case studies may be added in due course, also for other sectors. Member States and national stakeholders may take inspiration from these case studies when developing national solutions.

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

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

² Ibid, 6(a)

1.2. The definition of an orphan work

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

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

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

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

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

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

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

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

A work is “orphan” with respect to rightholders whose permission is required to use it and who can either not be identified, or located based on diligent search on the basis of due diligence guidelines. This search must be both in good faith (subjectively) and reasonable in light of the type of rightholder (objectively).

2. Due diligence criteria

2.1 Procedure

Main Principles for identifying and/or locating the rightholder:

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

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

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

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

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

The search process should be documented:

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

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

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

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

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

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

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

- Check the European Digital Library whether the work has already been digitised, including cooperation between similar cultural institutions
- Check files/sources on provenance

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

Examples of resources specific to certain subject matter

Books

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

Journals

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

Sheet music

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

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

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

Audiovisual material

- National film archives (investigation/identification of material held by such archives is part of the mission of these institutions)
- Registre public de la Cinématographie et de l'Audiovisuel, maintained by the Centre national de la Cinématographie (www.cnc.fr)
- Published filmographies (although these only record the original production company)
- In relation to underlying content, the organisations representing their rightholders, including CMOs
- (State) bodies providing financial support for the audiovisual sector

Visual material, including photography

- National projects to list known authors / creators
- www.vci-registry.org
- www.onlineart.info

2.3 Scalable guidelines

Scalable or modified guidelines for diligent search might be appropriate in at least some sectors for material the rightholders of which tend not to be represented by professional organisations. Fewer resources to find these rightholders are available so that a pragmatic, flexible approach to diligent search might be appropriate. This would not at all affect existing copyright protection of the works; merely offer a practical solution to cultural institutions in these specific circumstances.

In the text sector, there are likely to be such rightholders in “grey” and unpublished literature. Publishing means making available to the public. As a rule, an unpublished work exists only in one manifestation (the original). A significant amount of unpublished works are relatively mundane materials such as business and private letters, accounts, diaries, minutes of meetings, reports, registers. Often the author will not be represented by professional organisations of writers or other creators.

So called grey literature is an intermediate between published and unpublished works. Grey literature is published by non-commercial publishers, such as individuals, companies, government institutions, research institutes, foundations et alia. As a rule, such non-commercial publishers are not members of a publishers association.

A similar phenomenon of types of rightholders that tend not to be represented by professional organisations may also exist in the other creative sectors.

3. Other Issues

3.1 Measures which could help to prevent future orphan works

A work becoming orphaned is essentially an issue of missing or incomplete information. The best way to ensure that works do not become orphan is to address the creation, maintenance and accessibility of relevant information. The following is an illustrative list of measures that are apt to improve the availability of information on works, rightholders and rights:

- Use of electronic and other identifiers, including the name of the author
- Creation, use and maintenance of metadata on the work and its rightholders, for example through the automatic metadata creation as images are created
- Enhancing the value of standard identifiers (such as ISAN, ISBN, ISRC, ISMN, ISWC) and registries by recording the devolution of rights to second and further rightholders (as the French and Spanish audiovisual public registries already do);
- Naming relevant rightholders in/on works and their packaging, covers etc
- Keeping a record of relevant rightholders by users as far as practical
- Recording authors' death dates in name authority files of national bibliographies

3.2 Databases with information on orphan works

Databases which contain information on titles, rightholders and any metadata are useful tools to identify and find rightholders and hence facilitate digitisation projects. European projects which further develop such databases will be beneficial in this respect.