

APPENDIX TO THE JOINT REPORT – SECTOR REPORTS

EUROPEAN DIGITAL LIBRARIES

AUDIOVISUAL WORKING GROUP

Orphan Works sector –specific guidelines for the audiovisual sector¹

Chairs Tom Rivers (ACT) / Gabrielle Claes – ACE

1. GENERAL

1.1 Definition of an audiovisual orphan work :

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, as indicated in §2.1 below. 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.

1.2 Nature and extent of the problem

According to the survey by ACE 10 per cent of requests received by respondent institutions (50,000 items) could not be dealt with because the items in question were orphans. Because the analysis was restricted to items requested by potential users there was no way of knowing what the proportion of orphans in the archives’ holdings as a whole might be.

1.3 Examples of categories where orphans have been found by ACE members

- Documentaries particularly those from before the Second World War
- Commercials particularly those from before the Second World War
- Newsreels particularly those from before the Second World War
- Educational films particularly those from before the Second World War
- Commercially produced films made by European production companies which have subsequently gone out of business or have transferred their rights to another entity

It was noted that the inability to identify the owner of the economic rights in amateur productions might raise privacy and/or moral rights issues. It was thought that these considerations would be of particular relevance if the nature of the content was of a private or domestic character, whilst if the content was of public events, such concerns might be less.

¹ Final Version 4 April 2008

1.4 Definition of stakeholders

Organisations representing authors, producers, distributors, performers, broadcasters and other owners of rights in the sector.

Organisations representing public sector institutions holding and using audiovisual works

Organisations representing users/licensees

Organisations in possession of physical materials (such as film laboratories) which have deposited such materials subject to contractual limitations on their use

1.5 Excluded materials

The group considered whether due diligence guidelines should apply to non-European material.

On the one hand, it was argued that Europe's cultural heritage should be regarded simply as the actual material objects to be found in European cultural institutions, without regard to where they came from. It was also noted that at the start of a duly diligent process the nationality of the audiovisual work might be indeterminate, and indeed might not be discoverable at any later stage.

On the other hand, one of the stakeholders took the position that there would be difficulties in terms of satisfying the requirements of diligent search where the country of origin was outside the EU. The issue of international comity was alluded to.

It was agreed that this was an issue that would require further thought and discussion if to be taken further.

2 DUE DILIGENCE CRITERIA

2.1 Major resources

- National film archives (investigation/identification of material held by such archives is part of the mission of these institutions)
- National libraries
- State bodies providing financial support to the audiovisual sector – such organisations would normally be expected to retain information about the recipients of financial support and the audiovisual works in question
- Registre public de la Cinématographie et de l'Audiovisuel, maintained by the Centre national de la Cinématographie (www.cnc.fr) but only in respect of post WWII films made and/or distributed in France, and there is no obligation to register audiovisual productions which are not given a theatrical release (eg broadcast television programmes) unless in the case of television productions there has been state investment.
- US Copyright Office – failure to register with the Office barred any enforcement action by a rightsowner; the Berne Convention Implementation Act 1987 removed the requirement for foreign rightsowners
- Filmographies – but it was noted that these would only record the original production company
- Rights management organizations for authors, performers and producers.
- In relation to underlying content, the organisations identified by the other sectoral groups would be relevant in the event the audiovisual work as such was determined

to be orphan, since in such a case it would be necessary for the prospective user, having established the orphan status of the audiovisual work as such to move to the next level and determine in relation to each element of the content whether each such element was itself orphan or (if not) then if it was clearable.

2.2 What current instructions exist, if any?

National film archives no doubt have their own established procedures (see §2.1 above).

2.3 Does the character of the user/use play a role?

This was discussed at length at previous meetings without any consensus being reached.

3. WORK CATEGORIES THAT CAN BE CONSIDERED AS ORPHANS

3.1 What questions/issues play a role when evaluating if a work is orphan?

(a) genre of work – the most problematic genres are non-fiction material (eg newsreels, documentaries – see §1.3 above.

(b) country of origin – the starting point for investigating ownership would normally be the country of origin, but where this is not readily discoverable it may be useful to consult a source such as the French Registres (see §2.1 above)

(c) date of publication/making available – In general it is agreed that the older the audiovisual work, the more likely it is that there will be problems about ascertaining ownership of rights.

(d) where does the material come from? – the provenance of material deposited with an archive could be helpful, though it was clear that material sometimes arrived in the hands of an archive from someone who merely had possession of the physical material, for example a film laboratory, and no longer had any record of the rightsowner

3.2 What categories of works can be considered as orphans, if any?

No categories in the audiovisual sector were identified as orphans as such.

3.3 What historic cut-off dates exist, if any?

Historic cut-off dates are strictly of no relevance in relation to works which are orphan since such works are by definition works which are copyright-protected.

However, if the author is unknown (eg because the audiovisual material has no credits) then Art 1(3) of the Term Directive, which provides that works of anonymous/pseudonymous authorship are protected for 70 years after the work is lawfully made available to the public, will apply, and this may be a means of establishing that a particular audiovisual work is in the public domain rather than orphan.

4. OTHER ISSUES

4.1 What measures, if any, are proposed to prevent the birth of orphan works in the future?

- ISAN – but it is noted that the ISAN (as the ISBN) is not a dynamic identifier. That is, both the ISAN and the ISBN identify the first owner but do not track devolution of rights. So if rights in a particular audiovisual work are transferred, the ISAN will not yield the information as to the identity of the second owner.
- National registries of audiovisual works already exist in certain member states (eg France – see §2.1, also Spain) and might be adopted on a voluntary basis elsewhere.

4.2 Other cross-sectoral issues

- Release of material (held by cultural institutions/archives) to third parties. It is clear from the ACE survey that there is no consistent policy which determines whether material held by an ACE member is made available to a third party which has requested its use. It may be that the legal liability of an archive which releases material to a third party differs between Member States.
- Insolvency and wind-up. if one is interested in audiovisual material of a certain age (films or other audiovisual material dating from the 1950s or 60s) it may well be that the original distributor and/or the production company have been wound up (not necessarily because of insolvency but because the company ceased trading) and it may be relatively difficult to follow the trail of ownership.

It was agreed that both the above issues should be tackled by the AVWG after the end of February – ie in the second phase of work.

4.3 Other sector-specific issues

- User generated content
- Amateur production

Gabrielle Claes
Tom Rivers
4th April 2008

PARTICIPATING ORGANISATIONS

Association des Cinémathèques Européennes (ACE) (Co-Chair)	Association of Commercial Television in Europe (ACT) (Co-Chair)	Association of European Performers' Organisations (AEPO-ARTIS)
British Screen Advisory Council (BSAC)	European Broadcasting Union (EBU)	European Federation of Journalists (EFJ)
European Film Companies Alliance (EFCA)	Fédération Européenne des Réalisateurs de l'Audiovisuel (FERA)	International Federation of film Distributors Associations (FIAD)
Fédération Internationale des Associations de Producteurs de Films (FIAPF)	Fédération Scenaristes Europe - Federation of Scriptwriters in Europe (FSE)	Institut national de l'audiovisuel (INA)

VISUAL/PHOTOGRAPHY WORKING GROUP

Orphan Works sector –specific guidelines for the VISUAL/PHOTOGRAPHY sector²

Chair David Dawson MLA

A draft of this report was discussed at a meeting of the Group on 29th January. It has subsequently been commented on and amended by the Group. The report follows the headings proposed by the European Digital Library Copyright Working Group.

1. GENERAL

1.1. Definition of an orphan work in the sector (optional)

The Group discussed the definition of an orphan work, and felt that this was an area where all working groups would have similar definitions. The group felt that the key general principles were:-

- neither the rightsholder nor the author/creator nor their respective successors can be traced
- unknown and uncredited authors / creators
- anonymous / pseudonymous works are not orphans – and that this was an issue often dealt with in national legislation
- DR (droit reserve) credited instead of the author's name

1.2. Nature and extent of the problem with orphan works, if known

- the issue of visual works within other works (such as a visual work within a book) was discussed, and there are many such cases. A statement on the issue was drafted as a query to the Text Working Group was agreed and is attached to this document as an annexe
- a particular concern where there is an exception which enables publication without attribution. Examples include the use of DR (Droit Reserve) as a credit, and the failure of newspapers to credit photojournalists
- the extent of the problem appears to be limited for fine arts where authors are mostly known and traceable. There may be some problems in identifying the rights holder for works by deceased authors.
- there is a particular problem where an institution may have large collections of works, often created by non-professionals, which do not carry any identification of the author. As many of these will be local views, taken decades ago, or family photographs, it will often be very difficult to trace either the name of the creator, or the rightsholder.

1.3.1 Definition of subcategories, if any

- any list of sub-categories should be illustrative, rather than be seen as exhaustive
- architectural drawings were added to the illustrative list

1.4 Definition of stakeholders in the (sub) category

- “creators” should be defined as “authors/creators and their estates”
- “collection holders” should be used to define museums, libraries and archives, and commercial / non-commercial bodies

² 15th January 2008: updated at the meeting on 29th January

2. DUE DILIGENCE CRITERIA

2.1. List of major resources available for research, per subcategory

- the group agreed that there should be a common core list of resources that would apply to all sectors, to which could be added sector-specific resources – such as
 - national projects to list known authors / creators (example given of work in Finland)
 - www.vci-registry.org
 - www.onlineart.info
 - databases of CMOs
 - WATCH database – www.watchfile.com
- as many resources are national in scope, it was proposed that generic categories could be developed, and the Member States Experts Group could draw up detailed lists for their countries, ready for compilation into an EU-wide listing

2.2. What current instructions exist, if any

- none were identified
- it was agreed that it was possible to identify a due diligence process.
- it was understood that many of the steps of a due diligence process were common to all groups, and so the process below is only an outline.
- The key elements of such a process were to:-
 - check existing documentation (on image, packaging, letters, receipts etc) for evidence that will indicate the name of the author or rightsholder
 - check external sources of information - including directories, internet searches
 - make a public announcement that the collections holder is seeking to identify the author or rightsholder of works in their collections
 - document the due diligence process - the collections holder has a responsibility to demonstrate that the due diligence procedure has been conducted appropriately
 - the work may then be digitised
 - as much information as is known about the author and rightsholder should be recorded in the metadata associated with the item. For example the metadata may record that the work is by an untraced author, or give the name of the author and state that the rightsholder could not be traced. It may be appropriate to embed a simple statement in the technical metadata of the image - this might be in the form of '© untraced author, from the collections of Anytown Archives'. This standard statement to be agreed by all stakeholders.
 - the work may be published online, together with all relevant metadata that identifies the author and may subsequently help identify the author or rightsholder, or encourage them to come forward
 - include a transparent procedure for when the rightsowner comes forward – with a take-down policy and remedy where relevant
 - the procedure should give a single point of contact within the content holding institution
 - a standard remedy should be proposed - and that this should be linked to a standard fee paid (eg by a CMO) to increase transparency and to reduce the risk of punitive actions
 - moral rights - to ensure that moral rights are recognised and respected in the procedure, including the right of the author to request that materials are removed
 - need for a "windfall" provision where an image unexpectedly is identified to have a high commercial value – this is to escalate the level of the due diligence check to trace the rights-holder. In many cases, orphan works will have a very low commercial value. However, there may be occasions when an image may prove to have commercial value. It may, for example, be a

portrait who becomes well-known. In the event of substantial commercial income being derived from the work, then this income must be clearly identified by the collections holding institution, so that it can be paid to the rightsholder if they are identified. It is also the responsibility of the institution to redouble their efforts to trace the rightsholder, as a minimum this must include a public announcement.

2.3. Does the character of the user/use play a role?

- there should be no difference between commercial and non-commercial uses of works. Orphan works are copyright-protected, irrespective of the nature of their use
- However, the group did discuss the potential for the development of licences that may distinguish between commercial and non-commercial re-use of materials. This discussion was, however, beyond the immediate remit of the Working Group.

3. WORK CATEGORIES THAT CAN BE CONSIDERED AS ORPHANS

3.1. What historic cut-off dates exist, if any?

- it was agreed by the group that the earlier the date that an orphan work was created, the greater the chance that it could be out of copyright
- historic cut-off dates were not thought to be helpful, but could possibly play a role in the judging the extent of the due diligence process required.

3.3. What measures can be found for mass digitization, if any?

- it was agreed that mass digitisation should not prevent collections holding institutions from following due diligence criteria
- a legal or blanket licence could be developed to enable digitisation to take place
- it was unclear as to who could be authorised to represent authors of orphan works – this could be rights collecting societies. Any fees paid could help to search for rights holders, and if there were a surplus, then there could be a redistribution of licence fees to charitable organisations that support rightsholder sectors and to contribute towards the costs of additional digitisation
- any such licence would need similar provisions to the due diligence process for when rights holders come forward
- a different licence and fee structure could apply to commercial reuse of orphan works

4. OTHER ISSUES

4.1. What measures, if any, are proposed to prevent the birth of orphan works in the future

- ensuring automatic metadata creation as images are created
- ensuring that authors are credited in all types of publication – this is a specific recommendation of this group. This would avoid the use of the DR (Droits reserve) credit.

4.2. Missing critical other issues that need to be addressed and ways to work on these issues

- in the event of a dispute, there should be a similar process developed to that outlined in the licence for out-of-print works
- in the event that the due diligence process was not reasonably implemented by a collections holding institution, then there could be an enhanced fee paid to rightsholders

PARTICIPATING ORGANISATIONS

European Bureau of Libraries (EBLIDA)	European Federation of Journalists (EFJ)	European Visual Artists (EVA)
Finnish Museum of Photography	Museums Libraries and Archives Council (Chair)	Pyramide Europe
UK National Archives (Chair)		

ANNEXES

ANNEX 1: QUERY OF THE VISUAL WORKS GROUP TO THE TEXT AND AUDIO-VISUAL WORK GROUPS

The working group on visual material requests by means of a cross section query that other subgroups in particular the text group, but also the audiovisual group include the issue of visual works embedded in composed publications and works into their group's report.

Visual works, such as fine art, photography, illustration, design, architecture, sketches of the latter works and others are largely published in various types of text publications and audio-visual works. Art books, newspapers and magazines, scientific and fiction books with illustrations often have photography included, and TV programmes, documentaries and films are important re-users of visual images when considering digitisation and publication on the world-wide-web. The legal situation of visual works is often different to that of textual and audio-visual works because the licensing practice between publishers and authors of visual works differs regularly from model contracts used with text authors.

Due to the nature of copyright the author is the holder of a copyright. In the absence of proof that rights have been transferred or uses were licensed to a right holder the author remains the unique holder of the rights. In case where the rights holder of a publication cannot be traced and the work would be presumed as being orphan, the author or creator of the protected embedded visual works will still hold the rights on the images. In many cases, the author or creator of these works may not have been credited with their work.

There are different scenarios possible for the case where works of fine arts and photography are embedded in a publication, which all depend on the contract concluded between the parties involved. For those authors whose rights are represented by collecting societies for visual arts it can be presumed in general that only the print version was licensed. The collecting societies for visual arts do not transfer rights to publishers but license the particular use required. Any further use by the publisher or a third party is not covered by the original licensing agreement and requires a further license.

In case a concept for orphan works might apply in future, the included visual works would need to be dealt with in a separate way. The authors or creators of visual works might be identified, and may be represented by a collecting society even if other rights holders of the publication might not.

As concerns the authors of fine arts and photography being represented by a collecting society the necessary licenses may be achieved as usual. In other cases the respective authors need to be addressed. If collecting societies were mandated to intervene in this respect for instance by a legal

basis, they could intervene for more authors in the visual works sector.

To simply leave out pages with works of fine arts or others on the digitised version would not be an appropriate solution for any party involved and would not lead to the broader aim to enable the access to the EU cultural heritage. The collecting societies should be addressed because they are mandated to represent many authors and could give the required licenses.

Historical cut-off dates are in the debate as a solution. However all work groups should be aware that such constructions should not be applied when the legal situation of the embedded works can be solved and the authors, heirs or right holders can be traced.

A further issue is that of still images taken from film productions. This is particularly relevant where the still image is taken from a single frame of the film. This group requests that there be discussion with the Audio-visual group to establish if there are significant issues that apply in this case.

ANNEX 2: GUIDANCE FOR COLLECTIONS HOLDING INSTITUTIONS

If a work has been identified as an orphan work, and has been made available online, then institutions **must** develop a policy for how the rights of the rightsholder can be respected if they subsequently come forward or are identified. This is an area where the legal position is different in each Member State, and this guidance highlights some of the issues that institutions should consider in developing their procedure.

The procedure should:-

- recognise the rights of the rightsholder
- be available as a link from each page where an orphan work had been used
- give a single point of contact within the content holding institution and specify the time within which an initial response will be provided
- require the claimant to provide evidence of their claim
- propose a standard mechanism to ensure that the rightsholder is in the same position as if they had been identified at the time of the due diligence process. This may include the payment of a standard fee (eg the standard fee of a CMO) to increase transparency and to reduce the risk of punitive actions
- that to ensure that moral rights are respected, the right of the author to request that materials are removed and the rightsholder will be credited, where relevant
- recognise that there may be a need to intensify due diligence efforts if a resource is found to become popular, following the principles of the model licence for Out-of-print works

MUSIC/SOUND WORKING GROUP

Orphan Works sector –specific guidelines for the MUSIC/SOUND sector³

Chairs Véronique Desbrosses – GESAC / Shira Perlmutter – IFPI

The Music/Sound Working Group met twice, on 12 December 2007 and 29-30 January 2008. Over the course of these meetings, the Group focused its work on four main points: (1) a definition of “orphan work” for the purpose of this process of articulating due diligence guidelines; (2) identifying the scope of the problem for libraries and archives; (3) determining what acts should constitute appropriate “due diligence” with respect to those right holders taking part in the discussion; and (4) the importance of developing comprehensive and accurate databases of right holder information and possible measures to avoid future orphan works. The Group also discussed the need to deal with the interests of right holders who are not at the table, and identified some elements of a possible legislative approach that could provide a balance of adequate certainty for libraries with safeguarding the rights of what might be called “non-professional” creators.

1. DEFINITION OF “ORPHAN WORK”

The Working Group agreed on the following definition:

“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.”

Of particular importance were the following elements: (1) the definition should refer to “works and other subject matter” rather than solely to “works”, to be sure that the subject matter of all related rights is also covered; (2) whether or not a work is “orphan” must be determined with respect to each right in it held by each right holder (i.e., the fact that one right holder is known does not mean that the work is not orphan as to other right holders, and vice versa); (3) the definition should cover situations where the right holder cannot be identified as well as those where he or she can be identified but not found; (4) the requisite search must be both in good faith (subjectively) and reasonable in light of the type of right holder (objectively); and (5) the definition should incorporate by reference the agreed due diligence guidelines, rather than spelling them out. While this definition was developed solely for purposes of the current discussion, many of these elements could also be adapted to other treatment of the issue as appropriate.

2. SCOPE OF PROBLEM

The Working Group also sought to identify more precisely the nature and scope of the orphan works problem for libraries and archives in the area of music/sound works. In the music sector, particularly with respect to authors’ rights, due to widespread collective management and reciprocal agreements, the problem is limited. One problem is with respect to unpublished works where the copies/packaging have no, or inadequate, labelling. We discussed possible subcategories, but concluded that clear technical distinctions such as “published/unpublished” or “commercial/non-commercial” may not work well in the music/sound area, other than with respect to producers’

³ 4 April 2008

rights. It is clear, however, that from a library perspective it is generally much easier to find the right holders for commercially published products. Another difficulty is works originating in other countries, particularly where the content or the packaging involves more obscure and less accessible languages.

Libraries and archives also find it much more difficult to identify and locate right holders who are individuals rather than entities, with commercial entities being the easiest. The greatest problem is with individuals who don't define themselves as creators in that particular field, or make a living from it, so they are unlikely to join any related organisation or society. Non-local right holders may also be difficult to find.

Library projects involving mass digitisation are of particular concern, given the amount of time and effort needed to perform due diligence for each individual work. While collecting societies can be helpful in providing licenses, they may not be able to represent right holders who are not their members—which is often the case with creators of amateur music that is not subject to commercial use, or oral histories, vox-pop interviews etc.

Overall, the main challenge is in dealing with right holders who are not represented at the table in these discussions—and by definition will not be able to be represented in this type of discussions.

3. DUE DILIGENCE GUIDELINES

The Working Group further discussed what constituted appropriate due diligence in dealing with the interests of the groups represented at the table—i.e., what a responsible library should, and does, do to find the relevant right holders. We agreed that at least the following searches should be undertaken:

1. Check credits and other information appearing on the work's packaging (including names, titles, date and place of recording) and follow up through those leads to find additional right holders (e.g., contacting a record producer to find the performers).
2. Check the databases/membership lists of relevant associations or institutions representing the relevant category of right holder (including collecting societies, unions, and membership or trade associations). In the area of music/sound, such resources are extensive although not always exhaustive.
3. Utilise public search engines to locate right holders by following up on whatever names and facts are available.
4. Review online copyright registration lists maintained by government agencies, such as the U.S. Copyright Office.

4. IMPORTANCE OF DATABASES

The Group noted the value of maintaining complete and up-to-date databases of information that can be used to identify right holders. This is done on a regular basis by authors/publishers' and other collecting societies. It would also be desirable to encourage the development of separate online databases of currently orphaned works to facilitate finding the right holders—i.e., would-be users identifying works for which they cannot find the right holders. This could help ameliorate the orphan works problem, allowing the parties to minimise risk and negotiate acceptable terms of use and obtain the necessary authorisations as early in the process as possible.

5. OTHER ISSUES – BEYOND THE SCOPE OF DUE DILIGENCE GUIDELINES

Finally, the Group identified several critical issues that are not within the remit of developing due diligence guidelines, but will affect the acceptability of those guidelines on both sides. Any agreement on guidelines or their application cannot bind those who are not at the table or do not sign up. To fully deal with the core problem facing libraries, other mechanisms may therefore be needed. In the view of the library sector, this would require legislation.

Whatever the mechanism, how can sufficient certainty be provided to libraries while providing adequate protection to right holders? What would be both effective and acceptable? Once a library has completed the minimum standards of due diligence already discussed, the following elements were agreed to be important to deal with in future consideration in the appropriate context:

- A method to have the reasonableness of the search approved—e.g., by some sort of independent body. This would be particularly helpful for libraries in dealing with the mass digitisation problem—for example, using the technique of publishing an advertisement in a widely-read trade journal seeking the relevant right holder(s).
- If the search is approved as reasonable, then the library should have protection against being held liable for damages for infringement.
- But a right holder who discovers the use or is otherwise found/identified should be able to go to the library and negotiate a license commensurate with a fee that would have been payable at the time, refer the matter to the relevant collecting society, or request that the use cease. Libraries noted that they have already been employing a notice and takedown procedure to deal with subsequent complaints.
- Such a system would provide certainty but still leave legal rights in place. In other words, it would approximate the situation that would have existed if the library could have found the right holder in the first place.

PARTICIPATING ORGANISATIONS

MEMBERS		
Association of European Performers' Organisations (AEPO-ARTIS)	British Library	Groupement Européen des Sociétés d'Auteurs et Compositeurs (GESAC) (Co-Chair)
The International Confederation of Music Publishers / Confédération Internationale des Editeurs de Musique (ICMP/CIEM)	International Federation of Phonographic Industry (IFPI) (Co-Chair)	Independent Music Publishers and Labels Association (IMPALA)
Statsbiblioteket (Denmark)		

EUROPEAN DIGITAL LIBRARIES

TEXT WORKING GROUP

Orphan Works sector –specific guidelines for the text sector

Chairs Anne Bergman-Tahon – FEP / Elisabeth Niggemann – DNB – CENL

Structure of the document

1. GENERAL

- 1.1 Definition of orphan works in the sector
- 1.2. Definition of diligent search
- 1.3 Nature of the problem
- 1.4 Purpose of the memorandum
- 1.5 Possible impact of the character of the use
- 1.6 Definition of materials excluded from the memorandum

2. WORK CATEGORY

2.1 Published

- 2.1.1 books
- 2.1.2 journals
- 2.1.3 newspapers and magazines
- 2.1.4 sheet music
- 2.1.5 others – maps for instance

2.2 Grey

- 2.2.1 books
- 2.2.2 journals
- 2.2.3 newspapers and magazines
- 2.2.4 sheet music
- 2.2.5 others – maps for instance

2.3 Unpublished

- 2.3.1 books
- 2.3.2 sheet music
- 2.3.3. others – letters, pamphlets

3. STAKEHOLDERS BY WORK CATEGORY

4. DILIGENT SEARCH CRITERIA

4.1 Published

- 4.1.1 books
- 4.1.2 journals
- 4.1.3 newspapers and magazines
- 4.1.4 sheet music
- 4.1.5 others – maps for instance

4.2 Grey

- 4.2.1. books
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- 4.2.4. sheet music
- 4.2.5. others – maps for instance

4.3 Unpublished

- 4.3.1 books
- 4.3.2 sheet music
- 4.3.3 others – letters, pamphlets

5. OTHER ISSUES

1. GENERAL

1.1 Definition of an orphan work in the sector

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 of 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.

1.2. Definition of diligent search

One should refer to the definition and documentation prepared by the Copyright Subgroup of the High Level Expert Group and adopted by the High Level Expert Group at its third meeting on 18.4.2007.

1.3 Nature and extent of the problem with orphan works

Depending on the subcategories of text works, there might be significant differences to the extent of the problem. Yet no clear estimation on the extent of the problem with orphan text works have so far been provided by the cultural institutions.

1.4 Purpose of the memorandum

The request of the rights holders is that the clearance of rights is done on a title by title basis. (bearing in mind that one title may correspond to several works and that in that case each work should be cleared). It is otherwise accepted that in order for the cultural institutions to clear rights work by work, easier tools and procedures have to be developed and the necessary mechanisms have to be put into place. The objective of this memorandum is to examine for each type of work (see work category) what are the available information sources to be used to perform a diligent search acceptable for both rights holders and cultural institutions.

There is a need for more readily available sources and improved cooperation between cultural establishments and rights holders to make sure that the works digitised and made available on the internet do not prejudice the normal exploitation.

For some types of works, an historic cut-off date could be identified. However, no consensus has been reached among the group on the opportunity to include cut off dates regimes at EU level.

There is a rationale to work on the issue at EU level as it is recognised that clearance must take place in the country of publication of the work where the information sources are available.

1.5 Possible impact of the character of the use

When the work has been cleared as an orphan works, then cultural establishments will be able to use the work and so will publishers.

When we deal with online access, whether the 'offer' is made by a commercial entity (such as bookseller) or by a non-for-profit establishment (library), the impact will be the same.

1.6 Definition of materials excluded from the memorandum

For embedded artistic works we rely on the discussions in the Visual WG

2. WORK CATEGORY

2.1. Published

2.1.1 books

2.1.2 journals

2.1.3 newspapers and magazines

2.1.4 sheet music

2.1.5 others – maps for instance

2.2. Grey

2.2.1 books

2.2.2 journals

2.2.3 newspapers and magazines

2.2.4 sheet music

2.2.5 others – maps for instance

2.3. Unpublished

2.3.1. books

2.3.2. sheet music

2.3.2. others – letters, pamphlets

3. STAKEHOLDERS BY CATEGORY

3.1. Published

journalists, writers, translators, publishers, librarians, archivists

3.2. Grey

Authors (including composer & lyricist for music), non-commercial publishers, journalists, translators, librarians, archivists

3.3 Unpublished

Authors (including composer & lyricist for music), journalists, translators, librarians, archivists

4. DILIGENT SEARCH CRITERIA

(List of major resources available for research, per subcategory. These lists of resources are indicative, suggesting the various sources of information available).

4.1. Published

4.1.1 Books

It is recommended that a search be made through the following resources (this indicative list does not reflect a priority order and may be cumulative if relevant) (all the steps hereby described should normally be complied with where relevant to the work)

- Contact the publishers association in the respective country and the authors associations
- Check the sources on the history of relevant publishing houses,
- (Check the judiciary source to see whether the publications has changed hands) this needs to be checked whether these sources would be available to librarians
- Check the relevant business or personal directories or search engine searches of businesses or persons;
- Check with Public Lending Right authority databases where available
- Check the national bibliography published indexes of published material relevant for the publication type and subject matter,
- Check the books in print and the ISBN
- Check with the collective management organisations such as collecting societies and Reproduction rights organisation (RROs) in the relevant countries whether the rights holders are listed (might include sources that identify changes in ownership of publishing houses and publications).
- WATCH (Writers, Artists and Their Copyright Holders) <http://www.watch-file.com>
- Check the European Digital Library whether the work has already been digitised
- Additional sources to be named depending on the country (see case studies 1 and 2 from France and Germany), such as Probate records (to trace authors' heirs) and Company records (to trace publishers no longer trading) and Advertising in the local or national press, in professional or society magazines or on relevant networking sites or lists as appropriate and if likely to be beneficial to the search.)

The issue has been raised that the sources that should be consulted might depend on some factors such as the age of the work.

4.1.2 Journals

List provided by STM (see document attached case study 3)

- Published indexes of 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 (see below comment on imprints) including from local reprographic rights organizations;
- 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 engine searches of businesses or persons;
- Sources on the history of relevant publishing houses or scientific, technical or medical disciplines.

- Additionally, where the user can identify a prior publisher that appears to be out of business, the list of imprints available from this link⁴ should be consulted immediately prior to each use.

4.1.3 Newspapers and magazines

ENPA -1. Contact first of all the newspaper publishers; 2. contact the RRO if it has been mandated by the publishers; 3. If the newspaper has disappeared, contact the newspaper publishers' association;

EFJ -1. Consult any databases of works that have been established and 2. Consult the publisher of the work to discover who they say owns the work and 3. Consult relevant collecting societies to see whether they have an address of the author [*or heirs*] or a record of the work and 4. Consult all other relevant sources, including but not limited to associations of authors' agents, internet service providers and world wide search engines

It is recommended that a search be made through the following resources (this does not reflect a priority order and may be cumulative if relevant)

- Contact the publishers association in the respective country and the authors and journalists associations
- Check the judiciary source to see whether the publications has changed hands
- Check the legal deposit
- Check with the collective management organisation (CMOs) including Reproduction rights organisations whether the rights holders are listed
- Check the European Digital Library whether the work has already been digitised
- Additional sources to be named depending on the country

4.1.4 Sheet music

It is recommended that a search be made through the following resources (this does not reflect a priority order and may be cumulative if relevant)

- Contact the publishers association in the respective country
- Contact the composers and lyricists association in the respective countries
- Check with the agency managing the ISMN in the respective countries
- Check with the collective societies managing music rights (including the RROs) in the respective country whether the rightsholders are listed
- Check the websites listing publishers & sheet music available in the respective countries
- Check the judiciary source to see whether the publications has changed hands
- Check the legal deposit (if applicable)
- Check the European Digital Library whether the work has already been digitised
- Check the sources on the history of relevant publishing houses,
- Check the relevant business or personal directories or search engine searches of businesses or persons;
- Check the national bibliography published indexes of published material relevant for the publication type and subject matter,

⁴ <http://www.stm-assoc.org/documents-statements-public-co/2003-2007-documents-statements-public-correspondence/2007-documents-statements-public-correspondence/>

- Additional sources to be named depending on the country, such as Probate records (to trace authors' heirs) and Company records (to trace publishers no longer trading) and Advertising in the local or national press, in professional or society magazines or on relevant networking sites or lists as appropriate and if likely to be beneficial to the search.)

4.1.5 Others

Maps are treated as books or journals respectively.

4.2. Grey

With regard to costs for diligent search for orphan works the so called grey literature is an intermediate between published and unpublished works. Grey literature is published literature but it is not published by commercial publishers. The publishers can be individuals, a company, a government institution, a research institute, a foundation ... As a general rule non-commercial publishers are not members of a publishers association.

By definition there are multiple copies and the work is not rare – at least not in the beginning of the publishing process. The context of the text, the book with its binding, title page etc., will normally stay with the text. Because the author as a rule is mentioned somewhere and because the context stays intact, the risk of losing this information is smaller than in unpublished works. But the non-commercial publisher is quite hard to find. The publications themselves often do not give any clues where to find the publisher.

This means that a diligent search again is more time consuming, because the search for the publisher is more difficult. The collecting society might know the author, but it is likely that a smaller percentage of authors of grey literature are represented by collecting societies than authors of commercially published books.

For additional information on grey literature, see footnote 1.

4.2.1 Books

- Contact the publishers association in the respective country and the authors associations
- Check the sources on the history of relevant legal bodies
- Check the relevant business or personal directories or search engine searches of legal bodies or persons
- Check the national bibliography or material relevant for the publication type and subject matter
- Check with the collective management organisations (CMOs, collecting societies and RRO in the respective countries
- Check WATCH
- Check indexes and catalogues from library holdings and collections
- Check the European Digital Library

4.2.2 Journals

- Contact the publishers association in the respective country and the authors associations
- Check published indexes of material relevant for the publication type and subject matter
- Check indexes and catalogues from library holdings and collections
- Check biographical resources for authors
- Check relevant business or personal directories or search engine searches of legal bodies or persons

4.2.3 Newspapers and magazines

- Contact the publishers association in the respective country and the authors and journalists associations
- Check the legal deposit
- Check with the Reproduction rights organisations whether the rights holders are listed Check indexes and catalogues from library holdings and collections
- Check the European Digital Library whether the work has already been digitised
- Additional sources to be named depending on the country

4.2.4 Sheet music

- Contact the publishers association in the respective country and the composers and lyricists associations
- Check with the agency managing the ISMN in the respective countries
- Check with the collective societies managing music rights (including the RROs) in the respective country whether the rightsholders are listed
- Check the websites listing publishers & sheet music available in the respective countries
- Check the legal deposit
- Check the European Digital Library whether the work has already been digitised
- Additional sources to be named depending on the country
- Check the sources on the history of relevant music & lyrics writing,
- Check the relevant music directories or search engine searches of composers, lyricists, businesses or persons;
- Additional sources to be named depending on the country
- Otherwise please see 4.1.4. Check indexes and catalogues from library holdings and collections

4.2.5 Others

Maps are treated as books or journals respectively.

4.3. Unpublished

Unpublished works are very different from published ones. In most, but not of course in all, cases they will be of little economic value; if they did have such a value one would expect it to have been realised by publication. For the most part if there is an economic value it is more likely to lie in the artefact embodying the work (such as a signed letter from a famous person) than in the copyright work itself. Publication of the copyright work would normally have no detrimental effect on this

value. On the contrary it is more likely to enhance it by bringing the world's attention to the existence of the document.

Again with many exceptions, the majority of unpublished textual copyright works will be relatively mundane materials such as business and private letters, accounts, diaries, minutes of meetings, reports, registers, and more recently e-mails. Archives are full of such materials, and plenty of libraries and museums contain quantities of them too. They are often small-scale: just a single page or a few pages long.

Publishing means making available to the public. In the traditional world this happened by producing a large enough number of printed copies and by distributing them to an undefined audience.

In the traditional print world, the question how many copies of a text make this text public is not easily answered.

As a rule an unpublished work exists only in one copy, the original. This one copy principle often makes the work valuable. Maybe not always economically valuable, but culturally speaking it is likely to be more valuable than a single copy of a multi-copy book just because it is rare. If the author is famous it is of course immediately economically valuable. But even if the author is not famous, documents sometimes gain an economic value long after their "birth" because of changed interests of the public, new insights etc.

Orphan works exist among unpublished texts as well as among published texts. The percentage might even be higher because the context of a manuscript might get lost during time and with it the means of identifying the author – the risk is much higher than with books. It is probable that as many unpublished textual works in archives are orphans: the prospects of tracing the descendants of the authors of most private letters and diaries, for instance, are slim.

If tracing the rights owner by diligent reasonable search means contacting the publisher first and the collecting society second before starting the search for the author, then this means that these first two steps – publishers and collecting societies – are just not reasonable for unpublished works. There are no publishers involved, and few authors of unpublished works would contemplate joining a collecting society to protect their very limited economic interests, even if they were eligible. This also means that the diligent search has to look directly for individuals, which, we reiterate, is much more difficult, time consuming and more costly.

Other aspects to be considered are the moral rights, which unlike copyright, cannot be transferred or sold, as they exist to protect both the author's creative status and the integrity of his/her work. Such status is determined in the first place by the author's right to be identified as the creator of his/her work. For unpublished letters, manuscripts and other material the moral rights have additional dimensions. For instance, the depository may have intended eventually to give public access to the material, and this implicit aim may refer to access after the author's death; or an author may have forbidden making available a specific text which contains changes rejected by him or her.

Moreover, there may be moral rights to be considered which may be due to contextual circumstances, including but not limited to: censorship, self-censorship, historical, political, economic or personal issues that need to be taken into account whenever relevant, and which might even facilitate the diligent search.

4.3.1. Books (the definition of books will depend from country to country)

- Contact the authors associations in the respective country
- Check the relevant personal directories or search engine searches of persons
- Check the national bibliography or material relevant for the subject matter
- Check with the collective management organisation (CMOs), collecting societies and RROs in the respective countries
- Check WATCH
- Check the European Digital Library

4.3.2 Sheet music

- Contact the composers and lyricists associations in the respective country
- Check the legal deposit
- Check with the collective societies managing music rights including Reproduction rights organisations in the respective countries whether the rightsholders are listed
- Check the European Digital Library whether the work has already been digitised
- Additional sources to be named depending on the country

5. OTHER ISSUES

5.1 What measures could be proposed to prevent the birth of orphan works in the future;

- To record the authors' death dates in name authority files of national bibliographies;
- To use electronic identifiers
- To set national platforms for rights clearance

5.2 Ownership of rights in case of periodical publications

The group agrees that this is not the appropriate forum to deal with the issue of ownership.

PARTICIPATING ORGANISATIONS

MEMBERS		
Bibliothèque Nationale de France (BNF)	Conference of European National Libraries (CENL) (Co-Chair)	European Bureau of Libraries (EBLIDA)
European Federation of Journalists (EFJ)	European Newspaper Publishers Association (ENPA)	European Writers Congress (EWC)
Fédération Européenne des Éditeurs de Périodiques (FAEP)	Federation of European Publishers (FEP) (Co-Chair)	
OBSERVERS		
The International Confederation of Music Publishers Confédération Internationale des Editeurs de Musique (ICMP/CIEM)	The International Association of Scientific, Technical & Medical Publishers (STM)	UK National Archives

Footnotes

(1) Some references on "Grey Literature"

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Connections between open access publishing and access to gray literature, Marcus Banks, *J Med Libr Assoc.* 2004, April; 92(2): 164–166. Copyright © 2004, Medical Library Association,

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Resources for Scientists and Engineers, P. Rajendiran, 01/03/2006, *HEP Libraries Webzine Issue 12 / March 2006*, CERN, <http://library.cern.ch/HEPLW/12/papers/4/>

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