



European Writers' Council AISBL
Fédération des associations
européennes d'écrivains
Rue du Prince Royal 87,
B-1050 Brussels
Tel. +32 (0) 2 5510 893
EWC-Secretariat@inter.nl.net
<http://www.europeanwriters.eu/>

The European Writers' Council on Orphan Works

Public Hearing on Orphan Works
European Commission
Internal Market and Services DG,
Knowledge-based Economy
Copyright Unit
Brussels, 26 October 2009

Panel 1 – Orphan Works – Challenges and Opportunities

The European Writers' Council is the federation of national and trans-national associations of authors (writers, literary translators, and script-writers) in 33 countries of Europe, publishing altogether in all genres, according to different commercial and non-commercial models.

EWC strongly supports the digitisation for *preservation* of all types of work to sustain the primary knowledge resources of the European cultural heritage for the benefit of society. Furthermore, we believe that the *online accessibility* of orphan works can contribute significantly to add value in education, information, entertainment, and culture at large. In this context, EWC supports the museums, libraries and archives' objectives as part of the i2010 digital libraries initiative to digitise also orphan works that are or may be copyright-protected, provided that the system of rights for the copyright holders (the authors and their representatives) is maintained and respected.

Concerning the opportunities, in the first place, the relevant specific work developed between 2006 and 2008 by the Copyright Subgroup of the i2010: Digital Libraries High Level Expert Group should be considered as a valuable contribution towards concrete solutions in the area of orphan works.¹ Thanks to the Final Report and the various recommendations established by the Copyright Subgroup, we are not starting from zero. A number of elements were proposed as a "toolbox of possible solutions". For orphan works these include:

¹ See the i2010: Digital Libraries High Level Expert Group – Copyright Subgroup "*Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works*" 04/06/08, pp. 10-17, 24-25.
http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/meetings/index_en.htm

- A definition of an Orphan Work as a work “whose rightsholders are not identifiable or, if they are identifiable, can no longer be located”; or, when the rightsholder is “*unknown or untraceable by diligent search*”, and for which copyright may still exist. As such this is a workable definition which can be generally adopted to prevent ambiguities.
- Identification of the need for “sector specific criteria for diligent search.”
- Identification of the need for databases dedicated to orphan works.
- Identification of the need for a mechanism to clear rights to use an orphan work.²
- A Memorandum of Understanding. Although several cultural organisations (including a few national libraries) signed the accompanying MoU which focuses on orphan works and the observance of “due diligence guidelines”, as formulated in the Joint Report and the Sector Report(s) of the sector-specific working groups on orphan works, there was no legally binding instrument to guarantee the actual execution of the agreed upon practices.

On the diligent search principles proposed in the Final report and the MoU, and a minimum of relevant criteria required, there is more work to be done; on the one hand, on the implementation of its measures, and on the other hand, on subsequent, more wide-ranging sector-specific guidelines for a due diligent search that needs to be carried out before *the use and making available of a given work*. Further work is also required for diligent search mechanisms and systems, procedures, as well as for methods of external evaluation of its applications, of the documentation of the search processing itself, and of the results.

To facilitate the making available and use of orphan works, what is needed in addition to the due diligence guidelines and procedures is a de-centralised or distributed and interoperable European registry system, to interconnect the national resources. In this environment, the systems with databases and Rights Clearance Mechanisms to be established by the European project ARROW will directly support Europeana and other digitisation projects.

Nevertheless, there should be supplementary financial support for the development of databases where these do not exist at national level. We also ask the Commission to recommend that Member States make efforts to cluster the national databases and resources available in order to diminish and prevent fragmentation on the information concerning the works and their rightsholders. Additionally, it would be important to have an Internet portal with user-friendly access, at least bilingual, which must be also available for authors, or their heirs and other rightsholders.

It has often been stated by libraries that individual rights clearance on a work-by-work basis is costly and difficult, especially in view of the challenges of their plans for mass digitisation. Overlooking or avoidance of the due diligence search has the potential of making available works without respect for authors’ rights. We understand that digitising institutions want, under these circumstances, the so-called “legal certainty.”

² Ibid. 9.2. Orphan Works, i, ii, iii, iv, p.25.

We support a legislative solution at European level that would facilitate the measures to be adopted at national level with specific reference to orphan works. The guidelines at the European level need to allow for the diversity of potential solutions and resources at the national level.³ This combination is necessary given that various voluntary and regulatory mechanisms to facilitate the use of orphan works that already exist in different countries. Best practices are a fundamental support to any regulatory measures and to voluntary mechanisms. For this purpose, it is essential that the extended collective licensing system of the Nordic countries be considered as one of the possible solutions to handle the orphan works issue.

On Already Existing Solutions

If collective licencing is one of the solutions for OW, official public bodies may work in collaboration with Collective Management Organisations (CMOs). The latter can be entrusted with the administration and other procedures by the national authorities, since in the case of orphan works CMOs do not have a prior mandate from its authors.

In our response to the Green Paper on Copyright in the knowledge economy, we stressed the positive experiences of the Nordic countries concerning the ability of the extended collective licencing scheme to contribute to licensed solutions reached through agreements, based on the negotiation platform given by the extended collective license provision of the national copyright act. This has been evident in many cases of the so-called mass uses, for instance, within the photocopying sector. Denmark recently adopted a new, generally applicable, extended collective license regulation as a solution to the problems related to orphan works. In Sweden, the legislator is currently investigating the possibilities of introducing a similar regulation in the Swedish Copyright Act. Furthermore, the extended collective license system is also being looked upon as a means to solve the complex copyright related issues occurring in the development of digital libraries, such as the Europeana project.⁴

On Moral Rights

In general, it is necessary to address orphan works separately according to different sectors and repertoires. For the authors represented by EWC, the main type of work concerns “text” works. Text-works entail many forms, but to simplify matters we can group them as constituting published, grey literature, and unpublished works.⁵ Many literary works exist amongst both published and unpublished material. The writer/author may be the key stakeholder and primary rightsholder, especially because for unpublished orphan works, by definition, no publisher is involved. The genre of grey literature is more recent, and increases with the digital reproduction of documents; in many cases, the rightsholder is the company, government or institution from which the text has been generated. Of importance to us are the scholarly and educational materials which are often made available by their authors for their

³ See “The European Digital Libraries Initiative. Sector-Specific Guidelines on due diligence criteria for Orphan Works. Joint Report.” 2008.

⁴ We thank Thorbjörn Öström, Förbundsjurist/Legal counsel, Sveriges Författarförbund / The Swedish Writers’ Union for this contribution.

⁵ See “Orphan Works sector –specific guidelines for the text sector”

students, colleagues, and for larger audiences through the Internet. There are large quantities of educational texts that are produced by their authors without any specific remuneration since their institutional employers cover the cost and production of the material. However, as authors, they should not be dismissed as unimportant, and this principle applies equally to orphan works.

While the copyright status of a work is essential, the authors' moral rights are as important as the economic right to remuneration. The moral dimension of the authors' rights needs further consideration also in the field of orphan works. The moral rights need to be distinguished from copyright, since *moral rights cannot be transferred or sold*. Moral rights protect both the author's creative status and the integrity of his/her work.

For unpublished letters, manuscripts and other material the moral rights have additional dimensions: If a text-work has been bequeathed to a library or archive, for instance, it is possible that the author would intend to give access to the work only after his/her death or even after a specified number of years from the date of his/her passing away; or an author may have reasons to conceal his/her name, because of very important, usually difficult circumstances of self-censorship (personal, inner) or censorship (external), or due to other contextual personal or societal issues. It is also common that an author may forbid making public a specific text which contains changes which were rejected by him/her. All these aspects need to be considered as part of the due diligent search. In this area, historians, social scientists, researchers and archival experts can be of great help. In brief, an author may purposely not wish his/her identity to be known or recorded, and the question remains whether this right shall continue to be respected in the digital age.

On Translations

Translations may also occur amongst orphan works. At least when dealing with European works literary translators have a status as authors. Moreover, the Berne Convention establishes that "translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work" (Art. 2). This means that translations must be protected just as original works.⁶ Significantly, in a published work containing several texts, there are often texts whose translator/s may be unknown. In this case, the original text is not an orphan, but the translation may be one. Therefore, copyright and the moral rights of translators in published or unpublished works, both in the printed and the digital formats must be respected. The often quoted phrase coined by Umberto Eco, "the language of Europe is translation" takes an almost uncanny significance if the translations as or within orphan works are numerous.

On economic value versus social and cultural values

Although unpublished material is generally said to be of 'little economic value' according to many professionals in the cultural organisations sector (otherwise, it is often argued, the

⁶ See Martin de Haan, President of the of the European Council of Literary Translators' Associations (CEATL), Letter in support of EWC's Statement on the USA Google Book Settlement Agreement Public Hearing, addressed to the European Commission, DG Internal Market D1, Copyright and Knowledge based Economy Unit, 8 October 2009.

works would have been published), this argument should not be valid to dismiss the diligent search to “publish” (by making available) autobiographical texts, private letters, drafts of literary works, manuscripts of different kinds, etc. because a large number of them may have an important potential value for the history of ideas, of literature and culture. If we have a choice, it would be preferable to know the identity of these parents in order to diminish the orphan dimension of our shared cultures.

We thank the Commission for giving us the opportunity to participate in the Hearing, and remain available for further reflections on orphan works in the digital age.

Sincerely,

Myriam Diocaretz, PhD.
Secretary-General
European Writers' Council