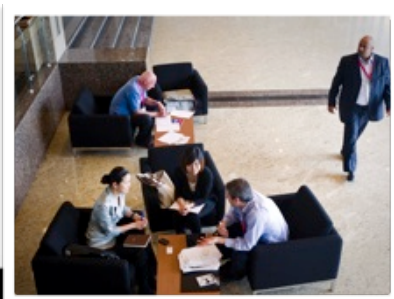


Stakeholder's meeting

Exploring progress on the issues of orphan works



Cepic Conference
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Angela Murphy
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Photographs by Angela Murphy; CTKPhoto/Petr Mlch; and CTKPhoto/ReneFluger



Over the past ten years of attending Copic copyright seminars, I have been in turn hopeful, depressed, enlightened, confused and infuriated by the endless twists and turns of legislation and practice. This year was no exception. Progress on resolving some of our business's most intractable issues can be desperately slow and, as always, such progress is inevitably overtaken by the inexorable rush of changes in practice and technological innovation.

It is also this that makes attendance at these seminars so crucial for practitioners. Once more, Sylvie Fodor and the Copic Conference team managed to attract some outstanding speakers representing both the image business and the industries that we serve and partner. As usual, there was a mix of expertise. Some speakers were there to represent the interests of a particular project or business: others were there to provide critical summaries of the ongoing legislative framework and to highlight significant changes. And, although some speakers stick to a narrow brief, others can bring new insights with their passion for this inevitably dry subject.

Over the years, a group of industry pros with a high degree of expertise in the subject has come to form the core audience for these seminars. It can be difficult for others to maintain an interest. Nevertheless, it remains true that everyone in our industry must, at the very least, come to a broad understanding of its issues in order to ensure the future sustainability of the creative industries.

The main subject of this year's seminar - so-called 'orphan works' - has caused innumerable headaches for those involved in the business of producing, distributing and publishing images. 'Orphan works' are those works that self-evidently have an author - but where the author is not known or is not contactable, so that it is not possible to know who has the copyright of that work, or indeed to know when the copyright in that work expires. The EC definition: A work for which the rightsholder cannot be identified or, if identified, cannot be located. *

There is currently no active legislation to cover this circumstance. As a result, hundreds of thousands of the works held in museums, libraries and archives are not copied or published unless the person copying that work is willing to risk being the subject of legal action by an as-yet-unknown rights holder. This is clearly a major problem for the curators and archivists of the world (not a traditionally risk-taking group).

To some people it may appear obvious that legislation should enable the publication of these works - whether they are photographs, musical compositions, films, works of art or literary endeavours. However, legislation of this nature - particularly in our digital world - can also be a threat to the economic and moral rights that are currently enshrined in copyright legislation.

Over the last few years thousands of words have been written and spoken in an attempt to find a resolution to 'the problem of orphan works' - not least in many previous Copic conferences. Draft legislation has been prepared for submission in European and American courts but, it is still the case, that many stakeholders are divided on the correct solutions to the complex issues involved.

This year's 'stakeholder meeting' was held by Copic as a participant in the EC's Arrow Plus initiative, led by EVA. By bringing together a broad spectrum of stakeholders, Copic aimed to present the perspectives of the various stakeholder groups and thus break down some of the misconceptions that currently existed - and to clarify the kind of solutions currently available. The ultimate purpose was to build a consensus that would break the present stalemate - both in expert and public opinion - and to progress legislation in partnership with technological changes. Stakeholders represented at the conference included photographers, photo agencies, publishers, cultural institutions, collecting societies and legislators.

From Arrow to Arrow Plus - government perspectives



To set the scene for this expert group, Copic's meeting was introduced by Auke Haagsma, a former European Commission official and now Director of ICOMP (Initiative for a Competitive Online Marketplace). Haagsma explained that there had been a critical change over the last few years in the way that copyright was regarded. In the past, changes in copyright law had been driven by creators, rights-holders and professional users who were experts in their field and interested in copyright protection. However, in today's online world, changes are being driven by users who have business models that are not enhanced by copyright protection. Instead their businesses require access to a wide variety of content that will attract advertising revenue.

Another strong influence on changes to European copyright legislation - and the emphasis on 'orphan works' - is partially the result of European initiatives to digitise Europe's cultural heritage and put it online, led by Commissioner, Neelie Kroes. This is a particularly important time as the Digital Agenda for Europe is now being discussed in Brussels and the EU is starting to introduce new legislation¹. Often, the picture being painted there is of an online environment where data protection, competition and copyright laws are seen as mountains that obstruct access to our cultural heritage and are obstacles to creative endeavours. Stakeholders need to address these concerns and show that they have solutions that will enable the move into the digital future. We need, as an industry, to create systems and tools that, combined with legislation, will facilitate diligent search and allow the use of true 'orphan works' without harming our businesses.

A current EC-funded project that has been designed to address these issues is **Arrow Plus** which builds on the work of ARROW (Accessible Registries of Rights



Information and Orphan Works towards Europeana) and this was described by Olav Stokkmo from IFFRO (International Federation of Reproduction Rights Organisations) - an international organisation representing collective management organisations in text and image-based works. Stokkmo explained that the initiative to digitise cultural heritage - the European Digital Library (now Europeana) - was Europe's response to Google's monopolistic digitisation plans, but distinguished from it by its desire to involve all the key stakeholders. Arrow was designed to support this and was being undertaken by a European consortium of national libraries, publishers and collective management organisations. Its principal aim was to find ways to identify rights-holders, and to clarify the rights status of a work (including orphan or out of print works). Something that is currently a complex and expensive process.

This initial project had created a pilot portal that could query multiple databases holding rights information; proposed the creation of registries of orphan and out of print works; and supported the creation of a network of rights clearance mechanisms. This system could be used by creators, publishers, libraries and end-users to facilitate rights research and would incorporate the key components of interoperability, standards deployment and stakeholder involvement. Arrow has demonstrated through its pilot projects that it could reduce the cost of digital rights searches by up to 95%. Thus it has the potential to dramatically lower the cost of mass digitisation projects and would encourage the publication and distribution of hundreds of thousands of orphan works. The intention is to ask EC countries to fund this interface and allow free use of it by cultural institutions.



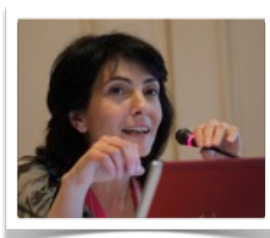
The Arrow project (2009-2011) was principally confined to books and other collective works, but the new project 'Arrow Plus' plans to expand the reach of this project by including visual works, not just when embedded in books, but also as individual works. Copic is a partner in this project. Stokkmo was keen to emphasise that, by involving absolutely everyone in the value chain, this European-wide initiative is a unique opportunity to create a common, scaleable and solution-oriented answer to a widely-held problem. Stokkmo agreed with Eugene Mopsik of ASMP that in order to work at a global level, Arrow

Plus would also need to align itself with US initiatives and that, although Arrow was initially European-centred, they were keen to have feedback and contributions from stakeholders at a global level.

Collective management of rights

The next session, moderated by Sylvie Fodor of Copic, focused on the need to build bridges between the various special interest groups. The presentations were designed to clarify these different approaches; to find common ground in their approach to solutions to Orphan Works issues; and to highlight the shortcomings of current orphan works legislation, such as the French 'Droits Reserves'.

Copic's survey of specialist historical picture libraries and a short film about 'A Day in the life of an Orphan Work' made by AKG Images in Germany both demonstrated the value that research, digitisation, cataloguing and conservation work adds to our cultural heritage. Sylvie pointed out that the systems and processes being created by Google and Arrow were already in



place in commercial picture libraries who are concerned that collective societies would form an unnecessary and costly administrative layer. On the other hand, if Arrow Plus could produce a system that, with the backing of new legislation, complements and supports the picture library business, this would be welcomed.

Several examples of 'orphan works' were shown including Ladislav Bielik's famous photo taken in Bratislava in the Slovak Republic during the so-called 'Prague Spring'. Bielik's son, Peter, related the problems that he had had in identifying his father as the photographer and in claiming the rights in the photograph. Legal objections to his claim centred on defining whether the image was an artistic work, or a documentary photograph without associated rights. The case was settled in Bielik's favour and he and his family now gain the economic benefits from any publication of the work.



Conversely, this story also demonstrated the flaws in the current system, whereby publishers could publish in good faith - and later face legal redress. Unless these issues could be resolved to the satisfaction of both rights holders and publishers, such works are not likely to see the light of day. Peter Bielik agreed with Nancy Wolff (PACA) that unless publication of such works was enabled, rights holders would be unable to find their works. Any solution would have to resolve this problem. It was not, however, resolved by the French practice of labelling large groups of photographs wholesale as 'Droits Reserves' (DR). As Ghislain Gauthier of the Union des Photographes Professionnels reported, DR has become a way for some publishers to avoid payment to rights holders.

New legislation has to include a requirement for both 'diligent search' and the payment of a fee which can be set aside for emerging rights holders when they are discovered. The UPP is therefore backing a new French proposal for collective licensing that incorporates both requirements. This will both encourage users to research provenance and enable the payment of market fees if a rights holder emerges. Creators will be able to challenge publishers to produce proof that a search has been done. Further discussion highlighted the need for legislation to avoid a conflict of interest if collecting societies both licensed collective rights and benefited from the collection of fees.

Nathalie Doury of Parisien Photographie, parent company of the famous historical archive, Roger Viollet, was at the Copic meeting representing the perspective of historical archives. She was concerned about the change in emphasis that has occurred recently in relation to orphan works legislation. Initially, this focused on enabling the distribution of unpublished historical images but it has now shifted elsewhere. Recent proposals imply that the display of orphan works on websites would qualify as 'publication' and thus require agencies to research rights for images that they will not necessarily sell. Thus they would be subject to fees without necessarily having an income.... If this issue was not addressed, historical archives would find it impossible to continue in business. Agencies should be seen instead as representatives of rights holders - and thus part of the solution rather than part of the problem.

Many historical agencies have vast collections of images, containing many extremely significant items. Parisien Photographie, for example, has 6 million photographs, 4 million of which are negatives drawn from a wide range of sources. It is probable that as much as 25 % of this content required additional rights research and a significant proportion is 'orphaned', as many collections were created in a different legislative and rights context and did not record creator names (e.g. the staff/stringer credits on news photos). Many historical picture libraries already partially function as collecting societies by publishing low resolution copies of these images on their websites, licensing editorial uses, and keeping back a proportion of reproduction fees 'to await claim'. They act as public repositories for this material and would be willing to open their archives to assist in rights research. In contrast, few collecting societies own either images or rights - and were not necessarily the right organisations to manage this process. By contrast, agencies were experts in rights research.

The creation of orphans is an increasing problem for 'born digital' works, as it is so easy to separate such works from information about their creators. Stakeholders felt that any legislation should encourage the use of IPTC information and strengthen the creator's moral right to accreditation. However, Daniel Barroy, representing the French government, pointed out that legislators had to find a middle way between the concerns of photographers, agencies and end-users. The enforcement of the right to accreditation was more a problem for negotiation and user practice. Currently, the only way to publish an orphan work in France was to obtain a licence from a judge. As a result, publishers using images under the US 'fair dealing' provision would not necessarily be protected in Europe as they would be subject to local under the terms of the Berne Convention.

Daniel Barroy's 2010 appointment as the government's 'Chef de la Mission de Photographie' highlights the importance accorded to photography in French



culture. Barroy's mission includes the resolution of the problematic issues of orphan works, such as 'droits reserves', while encouraging creativity. Stakeholders in France have agreed on a new definition of orphan works - "a copyright-protected and disclosed work ... one which has been proved and identified to be 'orphaned' after proven and serious research". The real problem for policy-makers now is to redefine 'neighbouring rights' and to define what constitutes 'proved and serious research'. Some

definitions of 'diligent research' were so stringent that establishing a system and tools to enable this would require a significant cost - a fact that is problematic within a sector that is experiencing economic fragility.

Draft orphan works legislation has been debated by the French senate, and adjusted following complex discussions about the nature of 'orphan works' and the definition of the various rights involved. However, the matter of who will manage these rights is not currently under discussion. One solution might be that individual 'fundholders', such as agencies, could be licensed to manage the items that they hold. Barroy felt that the main problem for the EC Directive, and other global initiatives would be to define 'serious and definitive research'.

Current practice regarding collective licensing in the context of existing legislation was exemplified by orphan works schemes adopted in Germany and the Netherlands - where the attitude towards the role of collecting societies is more relaxed than in the United Kingdom. Anke Schierholz of the German collecting society explained that, in these countries, collecting societies represented not only artists, but also photographers and photographic agencies. They offered indemnification to the publishers of orphan works by gathering and distributing fees on their behalf. Collecting societies had formed because certain rights cannot be administered reasonably by individual artists. They license individual rights in the case of fine arts - and collective rights for fine arts, photography, agencies, and publishers. By confining their licence to fine arts, they sought to avoid overlapping the function of picture agencies who generally licensed individual rights in photography. They felt that this was an innovative way to settle problems and reduce risks in the context of existing national legislation and that this could be a good working model for other countries.



Current practice had evolved in response to the problems encountered by historical and communal archives in the Netherlands and the national library and fine art archives in Germany. These institutions hold many photographs taken by unknown creators or private individuals who were not credited. Fine art photography tended to be taken by museum staff so that all rights went to the museum and individual staff were not identified. In addition, in a pre-digital world, digital rights had generally not been assigned.

This model, based on indemnification, granted legal certainty to users in a context where rights could not be granted. However, active concerns about piracy on the internet meant that they could not grant licences without remuneration - and this was also a key component for rightsholders. Stock cannot be sold unless there is a culture of remuneration, but the level of that remuneration was open to negotiation. Collecting societies were only willing to carry this risk if they could represent whole collections rather than just the orphan works within a collection. The assumption was made that archives had already carried out a diligent search and that about 20-25% of the remaining unidentified stock was orphaned. Both models were based on the question of where you shift the risk and this is reflected in the kind of licences granted. Archives could choose not to display these works, or they could take out insurance (if available), or they could shift the entire risk of display to collecting societies.

However, the licence granted only covered institutions in 'making the works available' i.e. public display and the download of low resolution images by registered users only on the condition that users should be informed that they must clear the rights of the artist and, if relevant, the photographer. No further uses were covered i.e. no sub-licences to 3rd parties, no downloads and no commercial uses were

allowed. The principle that this was based on comes from pre-digital times. The burden of proof was shifted to the end-users and the payment of rights fees was to be made by the end-user. The works were licensed according to the specific rights granted.

German collecting societies charge a very low flat rate for this and act as a central point for the collection of any fees due so that any emerging rights holder could go to the collecting society for their fee. Anke acknowledged that detailed terms were still to be agreed with picture agencies. Licences granted under the Dutch model incur a much higher fee, as the licence extends to internet usage. In this model, rights holders would be able to 'opt out' of the agreement - as this was seen as very important to them. They felt that it was fairer to include all the works in a collection as it offered more value to users and spread the risk taken by the collection society. In spite of this, many participants felt that if the correct legislation was put in place, the need for these schemes would be removed and costs would reduce.

The final speakers in this session were Mario Bouchard of the Canadian Copyright Board (CCB) and Linda Royles of the British Association of Picture Libraries and Agencies (BAPLA). Canada was an early adopter of a workable law relating to orphan works and the Canadian Copyright Board was therefore in a position to give feedback on its use over a number of years. The CCB prefers to use the term 'unlocatable copyright owner' to 'orphan works'.

Users apply for a licence to the CCB for a number of narrowly-defined works, e.g. published works (including on the internet) and recordings. The Board must be satisfied that a diligent search has been made and that the copyright holder cannot be located. If so, they have the power to grant a non-exclusive licence, if necessary with other conditions set by the Board. The copyright holder is entitled to a fee if a claim is made within 5 years. The main business of the Board is to regulate the fees that collecting societies set and they act under a set of assumptions e.g. they never assume that the author's permission has been given and they will not licence socially-repugnant uses. They don't issue licences for a work that is in the public domain. In about 30% of cases, they will set a rate contingent on the copyright holder emerging.

The use of a CCB licence is not mandatory and the involvement of the collecting society is voluntary on the part of board and controlled by the board so that conflict of interest issues do not arise. They also have a Memorandum of Understanding (MOU) with collecting societies so that they can help applicants with first 'diligent' searches before they apply for a first licence. Bouchard felt that, although the use of collecting societies was not necessarily the only solution, it was difficult to conceive "that the collecting societies would not be part of the solution." Furthermore, he felt

that an ‘indemnification’ solution was not a copyright solution but a contractual solution as the collecting society is taking responsibility for something they don’t own - and taking responsibility for dealing with rights owner. Canadian reprographic societies had followed this practice since the early 90s and it had worked extremely well. In 70% of cases - they act as a repository for the licence fee which is paid by the user even if a rights holder has not been located. As the



amounts are very small, and the Board sets the amount, the CCB allows the collecting society to spend the fee in whatever way they wish. This works well.

Linda Royles speaking on behalf of BAPLA thanked Copic for highlighting the fact that orphan works are currently being created in large numbers in the digital economy and for giving stakeholders a wonderful opportunity to listen to other points of

view and so improve the management of these relationships. BAPLA continues to invest in lobbying policy makers on behalf of their industry, acknowledging that the shape of this legislation is critical to its future. In response to this, the signature theme of BAPLA’s presentation was that of ‘building bridges’ and declared their eagerness to collaborate with other stakeholders to produce a proposal for legislation. Operating in the UK, the largest creative sector in Europe, BAPLA was keen to facilitate the UK as the centre of excellence for trading in IPR.

Linda was also able to make a preliminary comment on the newly-published Hargreaves Report on IPR² - the most substantive review of UK copyright for 300 years - which she described as “high in concept and low on detail.” Nevertheless, she felt that it had enormous potential and, taken together with the discussions at Copic, meant that the industry was at “a great moment of change” and dynamic dialogue. The report included 10 major recommendations, including action to create a simpler, automated licensing structure for clearing orphan works, starting with works in public ownership. Recommendations also included measures to tackle piracy (c.f. US), including the creation of a small claims court and the creation of a Digital Copyright Exchange - a one-stop shop for



licensing and identifying rights owners. If carried out, these recommendations would contribute 9-10 billion euros every year to the UK economy.³

However, BAPLA would, through continued lobbying, aim to protect the business model that we know, as well as the nascent business models of the future that were evolved with new technology. The Copic meeting showed that it was essential to build bridges with other stakeholders and manage each other’s expectations. In the UK, relationships with collecting societies had been tarnished with hostility and this needed to change. Commercial picture libraries in many European countries have very good relationships with and Canada had a very interesting model. However, BAPLA felt that any changes should be limited to users and usage within cultural heritage institutions - as a damage limitation exercise. Commercial uses should not be included as this had the potential to damage those commercial agencies that dealt with historic imagery. “Yesterday’s low value item is tomorrow’s high value product.”

In addition, Linda felt that the UK needed to strengthen its attitude towards moral rights and the need to prevent more works becoming orphans, including the protection of valuable metadata as it moved between humans and between machines. BAPLA was concerned that legislation had the potential to interfere in the economic rights of identifiable owners and aware of the need to protect direct licensing. To that end, BAPLA wants to work with technology and technology partners as well as collective organisations to create the correct rights framework to achieve this. BAPLA also endorsed the WIPO director’s statement that ‘the central question facing the evolution of copyright policy is how to maintain a balance between the availability of cultural works at affordable prices while assuring a dignified economic existence for creators and performers. Its purpose is to extract some value from the cultural exchanges made possible by technologies to return to creators and performers and the businesses associated with and engaged by them’. Finally, she announced that Bapla was producing a manifesto/proposal on this subject that they would send to members in the near future.

Learning from the US experience

The penultimate session at the meeting, moderated by Auka Haagsma, was about the work being done in the US to deal with orphan works created in the US and emphasised the need to deal with the global context of these issues. In addition, it was clear that there were a lot of lessons to be learned from the US experience and the fallout from the so-called ‘Google Books Settlement’. Speakers were Nancy Wolff, counsel to PACA, consultant to the American Bar Association and the Copyright Office Affairs Committee, and



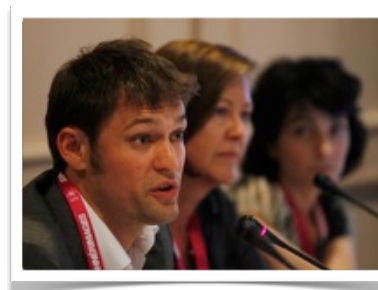
secretary to the Copyright Society USA; Chris Reed, Special Adviser to the US Copyright Office; and Eugene Mopsik, Executive Director of ASMP (a trade association for over 7000 photographers).

Nancy Woolf explained that Google had scanned hundreds of thousands of books expecting to be covered by the US 'fair dealing' provision and, when challenged by book publishers, had negotiated a settlement with them for the use of these books. It is the practice in the US to have a news blackout when legal discussions are going on, so the terms of the Google Books Settlement came as a great shock to many as it virtually created Google as the monopolistic supplier of digital books, whether or not these were in or out of print or copyright. The only way for stakeholders to get out of this agreement was to opt out - and this would exclude them from commercial gain.

The most significant current actions relating to orphan works were an ongoing lawsuit that concerns whether or not scanning is fair use and Google's reaction to a class action lawsuit brought by rights holders. Google has a lot of lobbyists in Washington and wants to propose a model that is digital friendly and thus not one that requires digital search. [Status hearing on 1 June 2011] ⁴. Nancy Wolff promised to update Copic when these actions had resulted in changes in legislation.⁵

Chris Reed spoke about the copyright-related bills pending in the US, particularly those aimed at pirate websites supplying downloads of music and movies. He explained that the US were also having difficulty defining digital search - especially in a global context - and on defining best practice. Draft legislation included the proposal that rights holders would be entitled to reasonable compensation and required a good faith negotiation about the level of fees. However, the disappointing news was that the proposed new copyright legislation in the US had not been passed by the Senate because it had run out of time. One contributing factor to this was that part of the legislation was devoted to patent reform which turned out to be more controversial than expected. As a result, the process had been set back to zero - and legislation proposals now had to be restarted. This is common in the US as governments are usually in power for a much shorter time than those in Europe. European legislation is generally put forward by government and so a much higher percentage of legislation is passed.

In framing orphan works legislation, policy-makers must balance the interests of a wide range of individuals and groups - creators, museums, libraries and universities among others. All have an interest in passing orphan works legislation but visual artists do not usually have the lobbying power of public bodies or aggregators of copyrights. The most commonly accepted solution is for interested



parties to create a common database or registry of rights holders.

As Eugene Mopsik pointed out, photographers are finding it increasingly difficult to sustain a living as visual artists and they are starting to become an industry of part-timers. Even if visual artists own the copyright, but have not registered their work with the Copyright Office in the US, their remedies are almost zero. In addition, creators are not eligible

for statutory damages and cannot afford to engage in legal actions or litigation to enforce their rights, unless they are backed by a strong professional organisation.

This was an issue that was highlighted at every PACA conference and ASMP has been pressing the Copyright Office to recommend that digital asset registration was incorporated within every corporate workflow. Chris Reed explained that the Copyright Office is aware of the concerns of visual artists and must strike a balance between understanding their business needs and creating a valuable public record. The Copyright Office, PACA and others continue to work through these issues with stakeholders.

Chris Reed added that although Google continue to scan books, the issue of breach of copyright legislation is still to be resolved and they risk being fined billions of dollars in potential damages. Bloggers using images take protection from the fact that they are just displaying the image - and are not the publisher. However, the DMCA's 'safe harbour' criterion applies only to ISPs. Users are only protected if they are not making money from this activity (e.g. blogs that do not contain advertising). Google benefits from 'safe harbour' as an ISP. Making money from advertisements that are not on Google's server are not a direct infringement so Google has been able to shelter under the 'safe harbour' provision. Under the provisions of the proposed legislation, only direct publishers would be able to publish on their sites.

Anke pointed out that the draft copyright legislation currently before the European parliament had a better chance of producing a practical resolution to these problems. Existing copyright legislation had already enshrined the rights of creators to exclusivity and the right to a fee, with a clear set of legal exceptions. This is an established precedent in the analogue world. Furthermore, all parties agree that they are pursuing the same aim - for users to pay for use and for a fair and simple method of distribution and remuneration. The European model was

much more flexible as users and providers were working together to create a system based on mutually-agreed practice and contract. As a result, it was easier for legislators to follow these models and know they were producing a practical system. Eugene Mopsik agreed that in the US there was too much friction to enable small rights uses. Neither Europe nor the US had copyright laws that were useful in the digital world and for libraries and archives - access is the critical issue.



Currently, ASMP are pursuing a 'class action' copyright infringement lawsuit against Google on behalf of visual artists (<http://asmp.org/articles/asmp-qa-google-class-action.html>). They are at the beginning of the process and have currently received over a million documents in support of the suit. To some extent, the progress of this suit will be contingent on the suit currently being pursued by the Author's Guild. Anyone whose work is published in the US has the potential to benefit from a successful outcome even though the class action has named plaintiffs.

Stefan Teste testified that he had personal experience of winning a case that related to the publication of thumbnails and that they had won the right to be paid for these uses. He felt that more progress could be made in Europe if cases like this were pursued in order to clarify existing copyright laws. In addition, European visual artists could pursue acts of infringement under the Berne Convention as creators



outside the US were not required to register their works. However, although this allowed court cases, creators outside the US were not eligible for statutory damages. Sylvie Fodor also queried the beneficial effects of the complex and costly registration system in the US. It was clear that the main beneficiaries of this system were publishers - for photographers producing thousand of works every day, the system was unworkable. Nancy Wolff explained that there were now a number of organisations that were working together to come up with practical systems, including PLUS (working for standardised licensing terms), PACA, ADSPP, and ASMP. These groups are now working hard to develop useful digital registries and databases in the US and to lobby for unique identifiers and image usage tracking.

There was general agreement that this was an ideal time for this group to liaise with the EC-funded Arrow Plus project over their proposals for a global registry. It was agreed that Copic should investigate the viability of combining forces and to engage with PLUS and a formal proposal was tabled that Copic should suggest this collaboration to Arrow Plus.

Image Recognition Technology



The final session of the day was devoted to demonstrating some of the technical tools and systems that might assist in the process of researching rights holders and tracking images on the internet.

The session was introduced by AKG's Alfonso Gutierrez who was keen to reinforce the point that commercial archives had been making cultural heritage available for years. They were experts in

the business of researching, digitising, cataloguing and preserving historical images - and, in particular, had various dynamic business models for resolving rights issues. An exemplar of the work done by commercial organisations to further cultural concerns, was the archive of Epoca magazine containing some 3.5 million images, including an extraordinary variety of historically-important images that have not been seen since their first publication. As he pointed out, these would remain hidden without the investment of Mondadori, a commercial company. Unless we could agree on a truly practical solution that would enable rights research and discovery, none of the initiatives discussed would work, including Arrow Plus. Privately-owned historical archives are also our cultural heritage. The session's three speakers were Kelli Grant, director of Pixway Inc., Offir Gutelzon, CEO and co-founder of Picscout, and Dennis van Bodegom, MD of Corrigan.

The software demonstrated by both Kelli Grant and Offir Gutelzon showed just how far image recognition technology has come since its early days. Technology now has a real opportunity to assist rights holders in tracking images and detecting illegal uses. The technology works by using finger-printing technology to mark images and then sends out web spiders to crawl the internet looking for these images. This technology can also find images that have been altered or where only small portions of an image have been used.



As Offir Gutelzon pointed out, it is possible for digital 'fingerprints' to be created every time a photograph is taken - just as exif information is created recording the technical details of the image-making process. This information is held within the image and could allow any digital image to be tracked, if necessary. And, as Alfonso Gutierrez pointed out, the automatic recording of geographical information would

also be of great assistance to future historians and researchers. All this information is capable of being recorded without any extra effort on the part of photographers. In fact, the inclusion of finger-printing technology was a vital element missing from many proposals for digital registries when formulating their registry systems

Picscout had based their system on extensive research and discussions with stakeholders. They hold over 100 million images on their registry, 60 million of which have already been indexed. Anyone can use this registry to find a visual match of images - a fantastic opportunity for picture researchers and image buyers who find Google image searches unreliable and time-consuming. The technology reveals sources as long as they are recorded in the IPTC headers and can therefore enable users to quickly ascertain which images can be licensed and from where. The registry is also open to any content provider - including cultural institutions and commercial agencies - to register their images and they now have over 200 content providers on their books. The technology is designed to be used on any system and with any client technology. PicScout is currently piloting a project with the Library of Congress to demonstrate this technology and show which of their images is public domain or available for licence. and can identify images that have been manipulated. The technology analyses and indexes IPTC information in any image.

Corrigan's image tracking technology also uses contextual information around a published image to identify clusters of works. This helps to identify the image rights of images that don't display IPTC information, so contextual information is critical.

In addition, they pointed out the ease with which new orphan works were being created in the digital environment

Both technology companies recognised that there was a public interest in this technology being held by an independent body so that it could be universally-owned and managed. The question of how this could be achieved was left open but it was clearly of interest to everyone. Offir likened the situation to that of trade mark registries that are held privately but run in the public interest. As he explained, PicScout have tried to create a registry - Image Exchange - that is open to everyone to contribute to. The system could only work if it was an open system with a publicly-available API, like Gracenotes or imdb.com. However, he was also sure that these innovations could only emerge from private initiatives. PicScout would like to see the registry run and developed privately with multiple options for suppliers to submit their images. in the same way, Arrow is being developed as a registry for all works, not just orphan works and its future business model needs to be clarified.

As Offir pointed out, the need to service a market had driven the development of the most attractive aspects of the technology so that the needs and requirements of image buyers and researchers were the factors that drove the development rather than political or cultural drivers. Always uppermost in their minds were the questions - What do image buyers and researchers need ? Does it help them to do their job ? Enlarging on this, Alfonso Guitierrez felt that we should now be ensuring that images hold not only IPTC information but GPS information and fingerprint identifications as well - ensuring that the technology could do the best job possible.

Offir explained that as long as their APIs were on an open platform, the images within any online image content holders such as Flickr and Photoshelter could be registered within a central registry. Dennis van Bodegom expanded on this idea of a centrally-held database and rights registry - and described the kind of system that was now technologically possible. All agreed that visual recognition technology now had the capability to find and track images but that, ideally, there should be one central database (although this could also work with multiple linked databases) where all the references could be stored. The technology companies could also see that it would be in their interests to assist policy-makers to create a workable registry and in ensuring that this was held independently of commercial interests. What was now required was for someone, or some organisation, needed to organise such a system.

Furthermore, we should all be concerned about the growing number of untracked images on the internet. Even if future technology needs to reindex all the images, this would be enabled by better indexing and cataloguing on the part of agencies - and this devotion to cataloguing standards would be readily identifiable in the ease

of discovery. Both agencies and institutions struggled to scan the many analogue images in their archives.

One of the questions raised was that of the occurrence of 'false negatives' and 'false positives' and the necessity for human intervention and filtering at some point in the chain. The speakers agreed that this would always be a necessity so that if there were a number of matches for a single image, then a human has to ensure that the correct rights owner is selected (e.g. where multiple photographers have taken images of a personality at a 'red carpet' event). This was the responsibility of the publisher. Another question related to the amount of storage that might be required to store 'fingerprints'. All were agreed that this was negligible and that the critical factor was that the registry should retain both the digital fingerprint and a matching low resolution image (600x400 is sufficient). It is not necessary to retain high resolution images. Another question clarified the fact that these fingerprints were software-dependent. The algorithms created by the technology companies was particular to their software.

Conclusions

In bringing together such a broad range of stakeholders in this complex and detailed area, Copic's Stakeholders Meeting allowed everyone to obtain a far clearer picture of the environment in which orphan works legislation is being formulated. The range of the presentations has also done a lot to remove misconceptions and misunderstandings. Copic has therefore ensured that stakeholders are now more likely to collaborate on solutions than focus on the problems. And this in turn will improve the likelihood that we can produce some clear and concrete solutions to the issues that currently beset the industry.

This is crucial if the industry is to preserve the value in its existing business models and develop new business models so that it can survive and prosper in the digital world.

1 On Tuesday 24 May 2011, the EC College of Commissioners adopted a proposal for a Directive on certain permitted uses of orphan works. The text which has to be approved by the European Parliament and the Council, recommends the use of ARROW to perform a diligent search in the country of first publication of a work

2 Downloadable copy of Digital Opportunity: A review of Intellectual Property and Growth is available at www.ipjo.gov.uk/ipreview-finalreport.pdf

3 7 July 2011 UK Parliamentary Debate on the Hargreaves Report looked forward to the government's response to the report "in the next month" (AM)

4 1 June 2011 at the status Google was given more time to try and reach a new settlement after the judgment in March 2011 that the proposed agreement was "not fair, adequate and reasonable" and would give Google "a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission." (AM)

5 19 July 2011 - At a further hearing Judge Denny gave the publishers and Google until 15 September 2011 to come up with a new agreement. Publishers are lobbying for an 'opt-in' provision rather than Google's current requirement that they could only 'opt out' of the agreement

Commentary: Critical issues (for legislators and other stakeholders to resolve)

From Arrow to Arrow Plus - government perspectives

- Stakeholders need to engage in the current EC-wide debate about IPR to ensure that the interests of their industry are represented
- Arrow Plus has the potential to create a rights database and registry tool for international use (Arrow: pilot portal created but not in use)
- In order to support this initiative, stakeholders need to contribute their experience of what is practical and workable, and agree on 'diligent search'
- At the same time, stakeholders need to ensure that the business model for this system is clear from the beginning of the Arrow Plus project
- Stakeholders need evidence that this project can be funded in the long term - and that the business model is sustainable

Building bridges - collective management and picture libraries

- The resolution of orphan works issues will involve the licensing of collective rights. Low level fees will enable licensing and publishing - and provide a fund for paying emergent rights holders
- We need to understand the various functions of collecting societies and picture libraries - and identify similarities and differences
- Collecting societies, picture libraries and agencies could all licence collective rights by working within common guidelines
- The 'agency' that collects collective licensing fees should be different from the body setting these fees
- A time limit should be set on the right to payment of emerging rights holders
- Collecting Society solutions are based on indemnification and thus comparable to insurance or picture agency practice
- European Collecting Society solutions are useful models pre-legislation, but legislation may make these solutions unnecessary
- Rights holders to existing orphan works will not emerge unless their works are publicly available - and can thus be found and identified
- Thus display and publication needs to be allowable (even if they are taken down later) as long as diligent search has been carried out and fees collected
- Legislators need to encourage diligent search - Droits Reserves does not
- A workable business model for collective licensing exists in Canada
- Agencies can act as both 'rights holders' and guardians of cultural heritage. They are not users/publishers
- The UK's Hargreaves Report recommendations are widely praised
- Policy-makers need to understand the added value of conservation, research, cataloguing and organisation - and work to protect this IPR

Learning from the US experience

- Parallel work is being done in the US and Europe - more collaboration needed
- However, there are crucial differences between US and EC copyright law
- These need to be understood - especially difference in 'fair use' provisions
- Creators in both domains could benefit from new legislation and systems
- Most important collaboration would be on the
 - definition of 'diligent search'
 - creation of digital registries and databases
 - exchange of rights information
- The Google Books agreement will have important implications for image creators - especially if Google agree to 'opt-in' provisions
- American organisations such as PLUS have worked hard to produce consensus between stakeholders, and European policymakers should make use of their conclusions

The Potential for Technical Solutions

- Any solution must enable simple, fast rights holder discovery
- True innovation is usually driven by the marketplace and focuses on user needs to a much more sophisticated extent than is possible in the cultural sector
- Any Digital Rights Registry needs to include a provision for digital fingerprinting and harvesting rights information from commercial partners
- Commercial registry principles (eg ImageScout)can be applied to cultural heritage collections
- Sophisticated image recognition technology exists and collaboration over the creation of a digital registry and database is in everybody's interest
- Public bodies need to discuss potential solutions to orphan works issues with technology providers at the earliest opportunity

Editor's Note

- Is there merit in separating the provisions for scanned and the 'born digital' material - e.g. existing provenance information ?

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