

Orphan Works in Practice

Registries, databases, collecting societies: What to do to protect your work?



A Report from the CEPIC Workshop in Dresden 2009
by Angela Murphy

Following on from the seminar on the current threats to the creative industries ('Getting our message across anti-copyright waters'), Cepic produced an extremely high-level seminar on one of the hot issues of the moment, so-called 'orphan works'. The seminar focussed on relaying the latest developments relating to orphan works together with a number of the various practical solutions that are being put forward to try and deal with some very complex issues, both in Europe and the US. The seminar, which was organised and presented by the EU-funded MILE Project, hosted presentations around three main themes:

- institutional solutions through collecting societies as in the case in France and in Germany
- trade associations solutions providing authors databases and OW registries
- business solutions such as those provided by Google or Picscout

The seminar was led by Jessica Tier of MILE and presentations were made by Luis Manuel Ferrao, Administrator DG Information Society and Media; Dr. Mihaly Ficsor, President of the Hungarian Copyright Experts Council; (a representative of) Naomi Korn, IPR Officer, Collections Trust; Jessica Saenger of the Börsenverein des Deutschen Buchhandels; Dr. David Sutton, Executive Director, The Watch File; Jeff Downey, Picscout; and Randy Taylor, CEO, The Copyright Registry.

Luis Ferrao introduced the seminar by discussing how orphan works have gradually come to the top of the political agenda with, first, the extension of the copyright term and, secondly, the growth of digitisation and the internet. Although these orphan works have always existed, initiatives such as the digital library project have increasingly put the spotlight on the collections within museums, libraries and archives and have raised current widespread expectations that these collections should put their content online. Whilst cultural collections would like to benefit from the new tools available to them, there are large swathes of content that are currently hidden as the rights holders are either unknown or cannot be found.

In 2006 the Commission recommended that member states should facilitate the use of orphan works and a copyright group was established who met with stakeholders to agree a course of action to enable this. The resulting Memorandum of Understanding produced guidelines for so-called 'diligent search' that is intended to assist users find the rights holders of copyrighted works of all kinds (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf). This was an important building block for the future of any orphan works legislation within the EU.

Senor Ferrao went on to describe the results of a subsequent EU study about the way in which member states had responded to this recommendation (see

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http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/appendix.pdf). Unfortunately this study has not revealed very positive results. Eleven member states said that they had no plans to facilitate the use of orphan works; others said that they felt that this issue was covered by extended collective licensing schemes; others recognised that although they felt that this was an important issue they had not yet tackled it, and some had only just launched consultations. The MOU contains some useful tools, including a definition of what constitutes an orphan work, guidelines for diligent search and lists of sources of information about rights and rights holders that should be consulted in order that a search could be regarded as diligent. However, as Senor Ferrao stated, these are currently voluntary measures and are not legally binding. Neither do they interfere with the copyright status of a work. One of the principles of these guidelines was that searches need to be carried out prior to the use of each individual work and that these searches should be thoroughly documented.

Significantly, the MOU has not resolved the central issue of enabling the mass digitisation of orphan works, merely recognising that this would require a more flexible approach than currently existed. Another important issue that the MOU highlighted was the need to avoid creating more orphan works in the future – especially recommending the use of electronic identifiers to identify creators and attaching metadata automatically to a work on creation.

The digitisation, online accessibility and preservation of cultural heritage are now an important priority for the EC – as evidenced by the launch of the European digital library, Europeana – and EC members were keen that the status of orphan works should not become an obstacle to the goal of the dissemination of cultural heritage material.

Last year's Green paper on Copyright also highlighted the issues of orphan works and the need for future legislation, and solicited feedback from member states (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-annex1-final.pdf). Senor Ferrao was hopeful that more concrete recommendations would be published in the follow-up paper being published at the end of 2009 as the orphan works issue was among the least contentious of the issues under discussion in that paper. In answer to a question about the concerns about the increasing lack of harmonisation in member states from industry expert, Linda Royles, Senor Ferrao was only able to offer the hope that member states would each be able to introduce their own orphan works legislation and that the first to do so had been Switzerland (not an EC member) where orphan works were subject to mandatory collective management. A major concern was the delayed response of most other member states. In this respect, the UK who had already published the Gowers Report were already far ahead of their neighbours.

Senor Ferrao's introduction was followed by a series of presentations showing different approaches to the issues raised by orphan works. One of the first responses to the need for a database of rights holders was 'The Watch File' (<http://tyler.hrc.utexas.edu/>) - a central database of

copyright holders set up in 1994 by the University of Reading in partnership with the University of Texas. The Watch File's Executive Director, Dr David Sutton, gave a broad presentation about the work of the Watch File in researching and documenting copyright holders. The File started as a database of literary rights holders and, as a result of popular demand, moved into the world of visual arts, focusing particularly on UK and US rights holders. Dr Sutton ran through a number of examples of the kinds of rights that the site tracks and the move into documenting the rights holders of other countries besides the UK and the US.



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Finally he explained the ways in which Watch can help with orphan works by proving 'diligent search' has been carried out. Summarising, Dr Sutton said that by expanding into many more areas of rights tracking the Watch File would play a central role in trying to resolve orphan works issues and also mentioned a new database of companies that had gone out of business entitled FOB (Firms Out of Business) at <http://tyler.hrc.utexas.edu/fob.cfm>.

One country that has made progress in responding to the EC's orphan works' recommendations is Hungary. Dr Mihaly Ficsor of the Hungarian Copyright Council expressed his personal concern that the academic community were pushing for a 'free' internet and 'free' access to cultural works which could not be sustained in the long term. Many academics approached this from the point of view of people whose income did not derive directly from their creative endeavours but rather from the frequency and quality of publication – and their 'free' access to research material. Thus they were far more likely to oppose copyright law as it did not directly affect their means of earning a living. In his view the 'fashionable' view emanating from the United States and spreading to Europe of 'free access' to intellectual property without remuneration or incentives was not popular in Hungary as they had had very specific experience under communism that this approach (i.e. forced collectivisation) did not work. As a result, former Eastern bloc countries feel particularly experienced in knowing when and how mandatory collective management could work. Dr Ficsor himself is a considerable expert in this field as shown in his publications i.e. "The Law of Copyright and the Internet – The 1996 WIPO Treaties, their Interpretation and Implementation" (Oxford University Press, 2002); "Collective Management of Copyright and Related Rights" (WIPO publication, 2003); and the "Guide to the Copyright and related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms" (2004). A copy of Dr Ficsor's paper is available for download on the Copic website.

The Hungarian Copyright Council exists largely to provide a mediation service between collective management organisations and users and the Hungarian Patent Office has the right to grant non-exclusive licenses – and set the fee - for the use of these works "*in those cases not covered by collective management*". In the case of non-commercial usage, the fee is only paid "after ... the author is located" whereas commercial users are required to put the fee in advance into a 'to await claim' account administered by the Patent Office. At the end of the 5-year license, any monies remaining are paid to a cultural content fund. As Hungary is one of the few member states to produce full recommendations and guidelines this was seen as a useful template for others to follow.

One of the key copyright cases currently in the news is the test case that the Swedish government have brought against the Pirate Bay.

website. The significance of this case was explained by Jessica Saenger of the German Publishing Association - *Börsenverein des Deutschen Buchhandels*. At the time of speaking the Swedish government had just won their criminal case against the three owners of Pirate Bay but an appeal was pending. Jessica set the current dispute within the context of the recent US 'Class Action' that was brought in the US against Google Books in 2005. This had been temporarily resolved by the so-called 'Google Books Settlement' which legalised the digitisation of in-copyright works under certain terms and conditions. This settlement is to be the subject of a 'Fairness hearing' in October 2009. There were many problems with this settlement not least the fact that, in effect, it made many works 'orphan works' with any associated revenues going in their entirety to Google without any provision for rights holders. The other striking outcome was the way in which the



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settlement reinforced Google's monopolistic position. The German Reprographic Rights Organisation VG Wort is developing an automated solution which will include claiming works, collecting and distributing compensation available under the Settlement (for works already digitised), as well as requesting removal of all German works. Börsenverein will be filing formal objections to the Settlement with the court.

As Jessica pointed out there is now enormous pressure to enable the publication of so-called 'orphan works' without the need to seek out rights holders and this was a major threat to the basic provisions of copyright law. As a result, organisations representing rights holders are turning increasingly to collective licensing solutions proposed by collecting societies and others. Allied with this is the recognition that member states must think more globally and band together to defend their common interests. In particular, it is imperative that all rights holders should address these issues as a matter of urgency. One example of this is the ARROW initiative to create "Accessible Registries of Rights Information on Orphan Works" and agree 'diligent search' guidelines. ARROW aims to provide both users and creators with a solid technological framework that will facilitate the identification of both IPR status and rights holders. The project's goal is to create a network of Orphan Works registries within Europe and to provide test beds for common standards and practices. Many organisations are now trying to come up with practical solutions to these issues which may in the future rely more on contract and criminal law rather than rights legislation.

These emerging organisations also need to back up their activities with current research. An important step in this direction is the recent publication of a study commissioned by the UK's Strategic Content Alliance - "*In From the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public*". This presentation was due to be given by Naomi Korn who had had to withdraw from the seminar at the last minute. A lively and engaging speaker, her presence was sorely missed. In her absence, her slides were shown and the report can be found via the JISC website at <http://www.jisc.ac.uk/news/stories/2009/06/podcast81infromthecold.aspx>.

Although inevitably UK-centric, the study also canvassed 27 European and 12 other overseas collections among the total 503 respondents. Although many findings will not have come as a surprise to those concerned with the rights issues in cultural collections, the study has now provided some vital statistics to inform the debate over public access and value lost.

Also inevitable, given the nature of their collections as the fact that the larger and most complex collections and archives could at best provide guesstimates based on their detailed knowledge of their collections – a fact reflected in the high proportion of responders who were unwilling to guesstimate (c25%-30%). One of the other vital but unseen benefits of this survey is the role that it must have played in raising awareness of orphan works issues among cultural organisations and hopefully of the need to gather rights information when acquiring collections. Although quite a high proportion of collections were prepared to use such orphan works "with a risk-managed approach", the study did not make it clear whether this was only likely to be in conjunction with their usual public access remit rather than in licensing this material for use in other projects and products – both commercial and non-commercial.

The study was also able to show that approximately 13.5 million orphan works were represented among the project's respondents alone. In summary, orphan works may comprise anything from 5 to 50% of cultural collections which could represent as many as 50 million orphan works across public sector collections. Most of these will be of little commercial worth and would not have been created



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as commercial entities. Indeed, the study estimated that it would take 6.5 million days to clear the rights of these items. Thus until practical solutions can be found to these issues, public sector bodies are either going to have the shut the door on these resources or be placed constantly in positions of risk.

The final two presentations of the session focused on two self-sustaining registry ideas in the commercial world. The first was about PicScout's online image tracking software which uses visual search technology to track unauthorised use of copyrighted images (see www.picscout.com). This impressive software is behind the defensive actions taken by many commercial image libraries such as Getty Images and Corbis. Unfortunately it is also associated with some heavy-handed techniques for redress largely because PicScout's income derives in part from high profile shares in compensatory fees. This has led to some lively discussions in internet forums when low worth individuals are targeted for using unlicensed images. The final presentation was made by Randy Taylor CEO of the recently-founded The Copyright Registry based in the US (<http://www.c-registry.us/>). The Copyright Registry on the other hand focuses on finding the true creators of so-called orphan works linking to the aims of the US Copyright Office. Users can use a bookmark to check website content and provide one-click information on the rights holders of any images used on that website, if provided. They also have a fee-based service that creates documentation of its tracking activities. Photographers can also use the service to crawl the web on their behalf checking unauthorised uses of high-earning images and thus protect their income stream. With current estimates at around three trillion images being used on the internet, this is likely to be an increasingly popular tool with image rights holders.

Editorial Summary

All the speakers agreed that we are in a critical phase regarding the issues that currently surround intellectual property rights and orphan works in our increasingly global digital environment. There was a general consensus that rights holders need more than ever to create collaborative projects and organisations to try and resolve these rapidly evolving problems. Unfortunately, these are taking on an increasingly complex nature and it was clear that the work of low key sector-specific bodies was no longer adequate to the task. On the other hand the user-driven initiatives aided and abetted by the internet powerhouses of Google, Spotify, Pirate Bay and many others are evolving at a phenomenal rate – the Google Library project has digitised over 7 million books to date. Government-led initiatives are urgently needed but tend to be hampered by the inevitable drains of bureaucracy and politics.

To grasp the most critical measures requires an extremely detailed knowledge of IPR law combined with a full understanding of the way in which technology can both hinder and enable rights holder goals. Some of the most interesting initiatives are being driven, as ever, by passionate individuals such as Dr Mihaly Ficsor of the Hungarian Copyright Council who described himself as more fully-employed in his retirement than in all his previous years as a high court judge and government official. Dr Ficsor's paper on extended collective licensing arrangements in relation to orphan works is an extremely useful model for other countries to follow if they have the will to do so.

Registries too have moved centre stage in this debate – some funded by the academic community such as The Watch Register which has taken on an increasingly wide remit in recent years – and some created as commercial concerns, such as PicScout's image tracking service and Randy Taylor's Copyright Registry, both of which use sophisticated visual search techniques to discover copyright infringements.



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Consensus was also clear on the need for society to acquire far more detailed information about the existence and creation of orphan works in all sectors and the Strategic Alliance's Report on orphan works in the cultural heritage sector was an important step in this direction. The report also pointed to the need to place the orphan works in these collections in a separate category to those in other sectors. They are often of great historical importance but rarely of high commercial value. There now exists a need to follow up this research with a more detailed analysis of the cost/benefits of cultural heritage digitisation projects – and a more informed assessment of the way in which these collections can be made more widely accessible without threatening the basic principles of copyright.



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Speakers :

- Jeff DOWNEY, [Picscout](#)
- Luis Manuel FERRAO, Administrator DG Information Society and Media
- Dr. Mihaly FICSOR, President of the Hungarian Copyright Experts Council
- Naomi KORN, IPR Officer, [Collections Trust](#)
- Jessica SÄNGER, [Börsenverein des Deutschen Buchhandels](#)
- Dr. David SUTTON, Executive Director, The Watch File
- Randy TAYLOR, CEO, [The Copyright Registry](#)

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