

The Situation of Orphan Works In Europe

Presentation at the pacca international conference, NY, 26 October 2008
by Sylvie Fodor



On Friday September 26th 2008 the disputed Orphan Works bill passed the Senate in the USA. Orphan Works (OW) are copyrighted works, where the copyright owner cannot be tracked down : the new legislation would enable users to reproduce works after “diligent search” but without facing the huge damages provided by US copyright law.

The USA represent a big market for copyrighted works and all foreign works will be affected by American legislation on OW, the most far-reaching legislation of its kind. The contrary is true also so that it may be worthwhile to have a look on what has been going on in Europe in the meantime, both at EU and at national level.

CEPIC
Centre of the Picture Industry

The position of the European Commission on Orphan Works

In Europe too, consultations on the OW issue have taken place. The debate started as early as 2005, but has run along different lines as in the USA. Orphan Works are not the primary concern in Europe but the problem of Mass Digitization brought about by the EU **i2010 Digital Library Initiative** which aims at creating a huge multilingual online database of digitised books, films, paintings, newspapers, sounds and archives from Europe’s greatest collections. The portal, Europeana, will launch on **20 November 2008**. Within this mammoth project, OW were identified as a major IPR challenge which may require an amendment to existing EU copyright law.

CEPIC-OFFICE
Fritschestraße 22
10585 Berlin
Germany
Tel. +49.30.88 91 01-60
Fax +49.30.88 91 01-61
ceplic@ceplic.org
www.ceplic.org

The key EU directive in the OW debate is the so-called **2001 Information Society Directive**. This directive, which has been said to be the most lobbied directive of all times, implements the 1996 WIPO Copyright Treaties, bringing copyright up-to date with the use of new technologies and the internet. It provides for a number of optional “exceptions to copyright”, meaning that each EU member state may decide whether to implement the exception or not. An additional optional exception to copyright could be considered, amending the above mentioned Directive : an exception for the reproduction of Orphan Works. This is the solution proposed by the Gowers Review on IPR published in the UK in 2006.

This has not been followed by the Commission in first instance: it is not easy to amend the “most lobbied directive of all times”, which, to make a bad case worse, has not yet been implemented into the national laws of all member states!

At European Commission level, no less than three DGs (Directorates General) are concerned by OW: the DG Internal market issuing copyright legislation, the DG Information Society, at the origin of the i2010 Initiative and the DG Education and Culture promoting cultural diversity. Stakeholders include collecting societies, museums and galleries, publishers, public and private libraries, as well as authors in all categories.

There are conflicting interests in our small industry too: museums may wish to publish material lying dormant in their archives without spending huge amounts of

money looking for the lost authors but photographers may not agree. Pictures agencies are faced with the same dilemma.

The Commission is therefore on a safe track. “Soft Law” prevails over “Hard Law”. The 2001 Directive is not to be amended but the Commission has issued recommendations urging National States to work out their own legislation.

This does not mean that EU legislation has been opted out. A **Green Paper on Copyright in the Knowledge Economy** was published in July 2008, dealing with issues raised by mass digitisation of copyrighted works. The Commission suggests the introduction of an additional optional exception to copyright, an exception for librarians, going much further in this than the UK Gowers Review.

The existing EC recommendations provide for a definition of OW: “Works still in copyright but whose owners cannot be identified or located”. This is a broad definition since it includes not only unknown authors but also authors whose identity is known but addresses or names have changed, in practice a very different situation. Secondly, the recommendations lay a number of criteria for “Diligent Search” – the list is long and the criteria stringent. Thirdly, the Commission recognises that legislation may not be sufficient to protect copyright owners – technology may help! The development of databases of information and of metadata in order to prevent the creation of future Orphan Works is expressly promoted. The picture industry is very familiar with this aspect of the problem : from the development of registries, such as PLUS in the United States or the MILE database, an EU funded project, or the organisation of metadata groups by all major trade associations in the industry: BAPLA, BVPA, PACA, CEPIC and IPTC etc.



CEPIC

Centre of the Picture Industry

CEPIC-OFFICE

Fritschestraße 22
10585 Berlin
Germany
Tel. +49.30.88 91 01-60
Fax +49.30.88 91 01-61
ceplic@ceplic.org
www.ceplic.org

National Perspectives

Member States should create mechanisms to facilitate the use of Orphan Works says the Commission. At the moment most member States do not have any OW legislation, and if they do, covering only partially the problem. The focus on the three main territories for copyright in the EU will give us an overview of existing options.

The UK

The UK is an interesting country because US copyright law stems from the UK common law tradition. The debate on OW has followed the same pattern as in the US, pushed by libraries urged by the EU initiative to heavily digitize their works. According to the British Library 40% of its copyrighted collections are orphaned. The UK is also the first the country in Europe to have addressed the problem of OW up front in the Gowers Review on IPR. The Gowers Review proposes the introduction of an exception to copyright for orphan works in the UK Copyright Act. In order to do this, it is, as we have seen, necessary to amend the 2001 Information Society Directive.

Not much has happened since the publication of the Gowers Review. Consultations with industry stakeholders are still going on. The UK government has reservations about a collecting society option used by Nordic countries (extended collective licences). Collecting societies can only act when they have a mandate from the author which by definition is not possible for orphan works! The UK government is also reluctant to work out a solution out of step with the EU: it will wait for the outcome of consultations on the aforementioned Green Paper on the Knowledge Economy before it amends its copyright law.

Germany

In Germany, OW is not yet an issue identified as deserving any further legislative attention. Not that there are no OW in Germany, but the present solutions seem sufficient to cover most problems in practice. The Green Paper recently issued by the European Commission may, however, push Germany to consider the issue of OW as such.

The first solution stems from the use of Article §191 of the German Civil Code, a document of the 19th century, a time when there was no internet. This is a recommendation of BVPA, the German Association of Picture Libraries, to its member agencies. Provided it has a contract but cannot trace the photographer, a picture agency may publish the picture but keep the money owed on a separate account for 30 years. The photographer has then 30 years to claim his due. In this case, the picture agency is neither infringing copyright, since there is a contract with the photographer, nor stealing the money since the money is kept safely.

The second solution stems from the recent adaptation of the 2001 Directive into German copyright law : Article § 31a UrhG (new)/ 137I German Copyright Law so called „Second Basquet“ . This legislation concerns “unknown usages” rather than “unknown authors”. Libraries in Germany were concerned about digitising works, unknown usage in existing contracts, and the new rule allows them to do so under certain conditions. As the arrangement includes all contracts, from known and unknown authors, it indirectly solves the problem of authors who cannot be traced, covering partially the OW issue.

France

France was the initiator of the **i2010 Digital Library** as a response to the all-English language Google Book project perceived as a one-sided private and culturally limited initiative. Europeana, the multilingual portal to the European Digital Library, was developed by the Bibliothèque Nationale de France.

As an initiator to the project, French government has followed closely the work of the European Commission. It set up an IPR Commission which conclusions were delivered in April 2008. They refer directly to the EU recommendations.

The IPR Commission recommends introduction of a definition of OW in French Copyright Law along the lines of the EC’ recommendations. Most importantly, it points out that it is would be inadequate to handle all works in the same way. The film and music industry have a very good registration system and orphan works are seldom; the still picture industry, on the other hand, produces thousands of works every day so that many are bound to become orphaned. In the first case, the present legislative framework is sufficient, in the second case as well as for literary works, additional solutions are necessary. The solution proposed by the IPR Commission is that collecting societies, acting as trustees, issue mandatory licenses on behalf of the unknown authors.

France has a very strong “authors rights” tradition and the protection of the authors will always be given priority. Photographers associations welcome the initiative as way to deal with the rising use of “DR” (Reserved Rights), an orphan work notice, so to say, and, as a joke goes, the most “famous French photographer on the internet”. A legislative solution seems better than the present unregulated practice. And it makes sense to ask for the intermediation of collecting societies, well established institutions in France, the country where they were born.



CEPIC

Centre of the Picture Industry

CEPIC-OFFICE

Fritschestraße 22
10585 Berlin
Germany
Tel. +49.30.88 91 01-60
Fax +49.30.88 91 01-61
ceplic@ceplic.org
www.ceplic.org

Which way to go?

As we have seen, in Europe too, OW have been recognized as an issue deserving legislative attention. Differences with the US outweigh similarities. The one striking similarity is the importance given to technology as the most effective way to protect copyright owners. Otherwise, European legislators would rather strike the balance in favor of copyright owners whereas in the US a lot is said about creativity but little about the creator. Truly, users of copyrighted material in the USA may face huge damages in case of infringement when registered which is not the case in Europe where penalties are much lower : the fee plus interests in Germany, the doubling of the fee in France ... Another major difference is the role of collecting societies, well established in Europe, almost non-existent in the USA. We can, however, not expect one-single- solution in Europe, even if legislation is harmonized at EU level along the lines of the Green Paper on the Knowledge Economy ! As we have seen, while several countries have already opted for the collecting society option, the possible exception to copyright for OW proposed by the Commission would only be optional.



CEPIC

Centre of the Picture Industry

CEPIC-OFFICE

Fritschestraße 22
10585 Berlin
Germany
Tel. +49.30.88 91 01-60
Fax +49.30.88 91 01-61
ceplic@ceplic.org
www.ceplic.org