

CENL Statement on Orphan Works and Out of Commerce Works

The Council of European National Librarians represents the national librarians of the member states of the Council of Europe. National libraries have an important role to play in supporting national cultural heritage through advocacy on research issues, and in the digital world are committed to building an integrated digital national library of Europe for the benefit of European culture and learning.

Increasing access to knowledge, and in particular its accessibility through digital means, is one of the fundamental necessities of the modern age. Our libraries and archives are of a richness and diversity without equal, and yet there are no appropriate legal mechanisms that allow in-copyright material to be digitised on mass and made available across Europe and beyond. In order to achieve the full potential of digital access to knowledge, and avoid a “black hole of the twentieth century” it is essential that an appropriate legislative solution is found for making orphan works and out of commerce works available.

Orphan works are in-copyright works where the creator or rights holder cannot be located or identified, and therefore permission to reuse their work online cannot be acquired. The national libraries of Europe are custodians of many such works, and between them have much experience of rights clearance. It is estimated that over 40% of a national collection could be an orphan work.¹ Undertaking the required ‘diligent search’ to clear rights in orphan works is time consuming and often fails to provide the legal certainty required in mass digitisation projects.

Many out of print, or out of commerce works, also sit in libraries and have been the subject of a Memorandum of Understanding between libraries, authors, visual artists, publishers and collective management organisations in 2011². It has been estimated in France for example that orphan works and out of commerce works combined account for at least 57% of copyright works created there in the 20th century.³

Mass digitisation will incorporate potentially tens of millions of individual, as well as collectively managed rights – only some of which are controlled by commercially active rightsholders. The research value of making such material available is huge but the existing European copyright framework subjects all these works to clearance practices devised for individual works.

¹ www.bl.uk/ip Submission to the Gowers Review of Intellectual Property

² http://ec.europa.eu/internal_market/copyright/copyright-infso/copyright-infso_en.htm

³ <http://www.senat.fr/rap/111-151/111-1511.pdf>

Recommendation

In order for copyright to remain responsive to the needs of creators and users it is important that copyright develops flexibilities to allow the mass clearance of rights.

A legal solution is needed to support the mass digitisation of European cultural heritage. As a minimum it must achieve the following:

- 1. Cover all Types of Copyright Works.** Cultural expression covers many types of copyright works, from personal unpublished video footage deposited in a library, or photographs of the First World War, to commercially produced books, films and sound recordings.
- 2. Cross-Border in Scope.** As the internet is global, any solution must create legal, financial and reputational certainty across the EU for European cultural bodies involved in digitising our cultural heritage and making it available on the web.
- 3. Enabling of Mass Digitisation.** Given the volume of rights clearance required in mass digitisation projects, and the time and money this requires, a flexible and pragmatic solution is required to facilitate use in this context. Any licence-based solution must fairly and equitably balance the interests of creators with the societal benefits of increased access to knowledge. Only a solution that is cognisant of, and fairly apportions all the costs associated with, mass digitisation will enable more of our cultural legacy to be made available online to European citizens.
- 4. Public Private Partnerships.** It is unlikely that the hundreds of millions of items that sit in European libraries will be digitised using public funds alone. It is therefore important that public private partnerships are facilitated by mass digitisation also.

