

ORPHAN WORKS EU PROPOSED SOLUTIONS

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UNIT D 1

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Policy Context

- Commission Recommendation 2006/585/EC (on digitization and online accessibility of cultural content and digital preservation)
- Communication on Copyright in the Knowledge Economy (October 2009)
- European Digital Agenda (May 2010)

Policy Framework - EDA

- Framework directive on collective rights management
- Directive on orphan works
- Green Paper on online distribution of audio-visual works
- Stakeholder dialogue on out-of-print works

Issues - Challenges

- **Precise scope of OW problem**
 - hard to quantify precisely
 - variable estimates
- **Challenge:**
 - how to provide legal certainty to use OW?
 - how to balance different interests (RH/users)?

Issues (cont.)

- **Diligent Search:**

- mandatory/optional?
- who carries it out / certifies it?
- who pays?
- HLWG guidelines: basis for harmonization?

- Note: existing or proposed OW legislation contain Diligent Search: HU, CAN, UK, USA...

Issues (cont.)

- **Costs:**
 - DS and Licences?
 - DS no Licences?
 - Licences no DS?

Issues (cont.)

- **Compensation for RH?**
 - past and/or future uses
 - property rights
- **Scope:**
 - ‘omnibus’ or ‘sectoral’ approach?

Possible Solutions

- Do Nothing
- Extended Collective Licences
- Orphan-Specific Licences
- State Licenses
- Copyright Exception
- Mutual Recognition system

Possible Solution 1

- **Do Nothing:**
 - leave it up to Member States to implement OW legislation
 - territorial i.e. limited scope
 - duplicate diligent searches
 - not viable for digital library projects

Possible Solution 2

- **Extended Collective Licence:**
 - legal presumption (representation by CS of all RH in a given category)
 - extension effect
 - opt-out system
 - collecting society = “guarantor”
 - no prior diligent search
 - territorial

Possible Solutions 3

- **Orphan Specific Licence:**
 - collecting society = “guarantor”
 - diligent search
 - territorial but
 - EU-wide access possible
 - but need multiple licences from each jurisdiction of 1st publication (repertoire fragmentation)

Possible Solution 4

- **State Licence:**
 - state entity = “guarantor”
 - diligent search
 - territorial
 - admin burden
 - individual licences (not suitable for mass use)

Possible Solution 5

- **Copyright Exception:**
 - no licence
 - diligent search
 - self-certified i.e.
 - burden of proof on library
 - 3 steps test compatibility
 - exceptions are usually narrowly circumscribed

Possible Solution 6

- **Mutual Recognition:**
 - of national solutions
 - less intrusive on MS legal and cultural traditions
 - more flexible (subsidiarity)
 - cross-border element present
 - how does ECL fit in?

Diligent Search

- One-time DS:
 - MS of 1st publication
- OW in one MS = OW in all MS
 - **Mutual recognition** OW status
 - Avoids duplicate searches
 - OW can be used/accessed across EU

Redress Mechanism

- Reappearing RH can:
 - opt out
 - request “take down”
 - negotiate fees for future use

Audio-Visual Sector

- **Archives**
 - Film heritage?
 - Broadcasters?
- **Cultural vs. Commercial?**
- **Orphan “Rights” vs. “Works”**
 - Multiple contributors to an AV production

Audio-Visual Sector

- **Purpose of Digitization:**
 - commercial (broadcasters) vs.
 - Non-commercial (film heritage)
- **Multiple Uses of AV works:**
 - Aired on TV
 - Screened in cinemas, museums, schools
 - Online streaming / download

Conclusion

- Complex issues
- No one size fits all approach in copyright
- Sectoral approach