

## **i2010 DIGITAL LIBRARIES HIGH LEVEL EXPERT GROUP (HLG), COPYRIGHT SUBGROUP**

### **KEY PRINCIPLES FOR ORPHAN WORKS AND OUT-OF-PRINT WORKS DATABASES (DB) AND RIGHTS CLEARANCE CENTRES (RCC)**

#### **BACKGROUND**

The Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation noted the strong roots of the European digital libraries in national and local efforts to digitise and preserve the cultural heritage. Creating the European dimension through a common multilingual access point requires thus a high degree of interoperability.

The Recommendations further noted that “Licensing mechanisms in areas such as orphan works [ ] and works that are out of print or distribution (audiovisual) can facilitate rights clearance” and “should therefore be encouraged in close cooperation with rightsholders.”

Concurrent with the Commission Recommendation, the Report of the Copyright Subgroup of 18 April 2007 stressed the voluntary aspect of solutions to be implemented within the framework of the i2010 digital libraries initiative. The Report further affirmed that among the governing principles for rightholders are (i) “digitisation and use within the premises of libraries should take place with rightsholders’ consent or be based on statutory exception”; and (ii) “Rightsholders’ consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof.” One of the governing principles for the cultural institutions is that “Access means either within the premises of the libraries, archives and museums or online availability.”

*Inter alia* on this basis the Copyright Subgroup Report of 18 April 2007 concluded that Databases and Rights Clearance Centres must be a part of the solution both for Orphan Works and Out-of-Print Works. Aiming to ensure interoperability, enhance co-ordination efforts and facilitate the multilingual access points incorporating national and local initiatives, the Copyright Subgroup decided to develop a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works and Out-of-Print Works. A team<sup>1</sup> was established to draft the Key Principles presented by the Copyright Subgroup as annexed to this Report.

The Google representative in the Copyright Subgroup expressed reservations in respect of some of the Key Principles and fundamental basis on which some of the Key Principles are built. In particular, the Google representative had reservations with regard to the definition of out-of-print works adopted by the Copyright Subgroup and approved by the HLG as a right of rightholders to

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<sup>1</sup> Team led by *Olav Stokkmo* (IFRRO) and otherwise made up of *Toby Bainton* (SCONUL and EBLIDA), *Claudia Dillman* (Deutsches Filminstitut), *Anne Bergman-Tahon* (FEP), *Myriam Diocaretz* (EWC), *Sophie Scrive* (ENPA) and *Tarja Koskinen-Olsson* (IFRRO). Members of the Copyright Subgroup who were not on the team have been copied in. *Patricia Moll* (Google) commented on the OPW Key Principles, *Jean François Debarnot* (INA) on the OW Key Principles.

unilaterally declare a work to be out of commerce. This is *inter alia* based on a document submitted on proposed changes to the Out-of-Print Model Licence. The Google representative is therefore, without opposing the adoption of the Key Principles, not in a position to endorse them. With the view to continue the constructive discussions engaged in the context of the Copyright Subgroup, the Google representative reserve the possibility to provide further comments on the Key Principles. It is in the interest of all concerned that the i2010 digital libraries initiative is allowed to progress and solutions developed by the Copyright Subgroup be tested out. There is general agreement in the Copyright Subgroup that proposed solutions will have to be reviewed in the light of practice and best practices.

## **ORPHAN WORKS**

### **General point of departure**

The overall solution for orphan works consists of:

- i. Diligent search criteria that a user needs to fulfil prior to the use of the work. (Diligent search for rightholders to the work, and clearance of rights, will normally be carried out in the country of origin of the work when identifiable)
- ii. Database(s) (DB) of orphan works to facilitate users in their search, which is needed irrespective of any legislative solution;
- iii. A rights clearance procedure and (a) Rights Clearance Centre(s) (RCC) to grant licences when they can be offered by a mechanism set up by rightholders;
- iv. National solutions which may include legislative/regulatory support and mutual recognition of different solutions in various Member States to achieve the cross-border effect needed for the European Digital Libraries (EDL);

The Copyright Subgroup has listed a number of legislative options that a Member State has available and emphasised that mutual recognition of each other's solutions is needed to achieve the cross border effect necessary for the EDL<sup>2</sup>. Based on the recommendation of the Copyright Subgroup, stakeholders representing rightholders and cultural institutions are currently working to develop due diligence criteria that are needed to establish whether a work may be considered an orphan work.

The Key Principles proposed by the Copyright Subgroup with this Report, and annexed as Appendix 1, concentrate on three implementation issues, which are not dependent on each other, and are needed in an overall solution to find a workable mechanism to use orphan works, primarily by cultural institutions but also by other users:

- Sector specific criteria for diligent search for rightholders to copyright works
- databases of orphan works; and
- rights clearance mechanism to issue a licence to use an orphan work.

### **Database and Rights Clearance Centre**

The rationale of a Database (DB) is to provide assistance to users in their search endeavours. Interlinking national databases and registries is needed to enable a European common

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<sup>2</sup> Reports of 16 October 2006 and 18 April 2007

multilingual access point and a European wide resource possible. It should take account of the variety of existing and future information resources.

The national Rights Clearance Centres (RCCs) could act as portals and common access points for clearance of rights and be accessible across borders. The user, defined as the one who requires a licence to digitise and/or make available the work and/or make other use of it, has the full responsibility for carrying out a diligent search for rightholders to the orphan works. The diligent search must be carried out and documented prior to the granting of a licence. The process could typically be:

- The institution or individual wishing to digitise, make available or otherwise make use of a work states the interest and includes a description of the required use with a declaration that the user has been unsuccessful in identifying or locating the rightholder and that the work may be an orphan work
- The potential orphan work is described with whatever metadata (name of the author, producer, etc.; title of the work, etc.) is available, and, in the absence of metadata, makes use of other means to describe the work such as snapshots, a facsimile, photo, video clip, excerpt of a piece of music.
- The licensing conditions of the work if it remains orphan following a diligent search for the rightholder should be available prior to the start of the diligent search.
- Diligent search for the rightholder(s) is carried out according to established search criteria and guidelines for the sector concerned
- Evidence that a diligent search has duly taken place according to the sector specific criteria and guidelines are presented
- The intention to make use of the work and by whom as well as the evidence of the diligent search for the rightholder(s) are registered in and publicised in the Orphan Works DB
- The RCC assesses whether the search is diligent, and, if so, informs about licensing criteria for the work in question and grants/refuses to grant a licence within a defined period of time
- The RCC may wish to take up an insurance to limit financial risks in respect of future claims that may be raised
- The required fees, i.e. transaction costs and, when applicable, the licence fee are paid to the RCC by the user
- The information on the granting of the licence and the licensing conditions including the further use of the work are publicised in the DB.
- If the rightholder, or his/her representative reappears the RCC examines the claim and certifies that the claimant is the correct rightholder and pays out, when applicable, the collected fees
- Upon certifying the right claimant, the information on the rightholder and the consequences, etc. for the licence is published in the Orphan Works DB

## **The Key Principles**

The Database foreseen to be interlinked in the European Digital Libraries initiative is a register of metadata rather than a works database. In order to facilitate interoperability also with existing resources a general principle is that it should, as a starting point, be based on existing standards rather than developing new ones. The Key Principles encompass

1. Policy of the Database
2. The Database structure and content
3. Metadata to be contained as a minimum and how to address the absence of metadata
4. Standards and how to address issues of standards
5. Interoperability criteria, including a registry of works which have been digitised and for which authorisation has been granted

The Rights Clearance Centre Key Principles include

1. Policy of the Rights Clearance Centre
2. Licensing policy and issues
3. Licensing conditions and how to address them
4. Remuneration policy
5. Interoperability issues
6. Transparency issues

## **OUT-OF-PRINT WORKS**

### **General point of departure**

The solution for out-of-print works is based on

- (i) Model Licence;
- (ii) Database registers on works declared to be out of print/distribution/commerce; and
- (iii) National Rights Clearance Centres to be used by rightholders on a voluntary basis to complement individual direct licensing by rightholders.

The Model Licence has already been approved by the Copyright Subgroup and the HLG and is posted on the European Commission's website. With this Report the Copyright Subgroup presents the Recommended Key Principles for the establishment of Databases and Rights Clearance Centres in connection with the i2010 Digital Libraries initiative as annexed as Appendix 2 to the Report.

The Key Principles build on previous decisions made by the Copyright Subgroup as approved by the HLG, including the definition of works out of print/distribution being those declared by the pertinent rightholder(s) to be no longer actively commercialised. Moreover, the Rights Clearance Centres are foreseen to be used on a voluntary basis by rightholders who often will be in a position to enter themselves into direct licensing agreements with libraries, museums and archives. It is, however, necessary to consider clearance centres which can act in a complementary fashion to individual, direct licensing.

### **The Database**

The Database foreseen to be interlinked in the European Digital Libraries initiative is a register of metadata and not a works database. The rationale is to provide assistance to cultural institutions on works that are no longer being commercialised by the rightholder(s). Users may be offered access to such works on conditions that may be different from those which apply for works in print. The Key Principles aim to provide information on such works to be available across border and thus to facilitate a European wide solution through interoperable national databases.

The optional use of the database is recognised. The result of this is that the registry will not be complete. It is, however, assumed that it will be in the interest of all stakeholders that a high quality registry of out-of-print works be established. Its quality depends largely on the use of the opportunity that such a database provides.

It is assumed that institutions will present to rightholders and/or their representatives a request to digitise a work. The out-of-print works register will typically be built up through registering the work upon a declaration by the rightholder their lack of intention to commercialise it further. The rightholders may also wish to register a work with the database as being out-of-print regardless of a request for digitisation or other use of it.

In order to facilitate interoperability with existing resources a general principle is that it should, as a starting point, be based on existing standards rather than developing new ones. The Database Key Principles further address

1. Policy of the Database
2. The Database structure and content
3. Metadata to be contained as a minimum and how to address the absence of metadata
4. Standards and how to address issues of standards
5. Interoperability criteria, including a registry of works which have been digitised and for which authorisation e.g. under the Model Licence has been granted

### **The Rights Clearance Centres**

The Rights Clearance Centre can, subject to the mandate, both grant licences to digitise and make available works and redirect to the pertinent rightholder for possible direct licensing. The Key Principles address

1. Policy of the Rights Clearance Centre
2. Mandating by rightholders
3. Licensing policy and issues
4. Licensing conditions and how to address them
5. Remuneration policy
6. Interoperability issues
7. Transparency issues

**POSSIBLE COMMUNITY MEASURES FOR ORPHAN WORKS AND OUT-OF-PRINT WORKS**

The European Commission could

- A. Based on the Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation
  - i. Recommend to the Member States that they encourage rightholders to establish Rights Clearance Centres for orphan works
  - ii. Publish the Key Principles for Orphan Works Databases and Rights Clearance Centres on its website and recommend that they be used when such databases and rights clearance centres are established
  - iii. Publish the Key Principles for Out-of-Print Databases and Rights Clearance Centre on its website and recommend that they be used when such databases and rights clearance centres are established
- B. As a prerequisite for establishing the suggested measure A. above, provide financial assistance to the development of technical standards and test beds for orphan works and out-of-print works Databases and Rights Clearance Centres, such development to take place in collaboration with rightholders, cultural institutions and other stakeholders.

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