

Jim KILLOCK, The Open Rights Group

Orphan works hearing

I'd like to open by making some general remarks about the orphan works debate, to put the question of remuneration and licensing into some context.

Orphan works point to a major failing within our current copyright system. The purpose of copyright, as the Open Rights Group understands it, is to provide a means to remunerate creators, and thereby incentivise the creation and dissemination of cultural works.

That copyright can be used against its objectives in such a way, and effectively stand in the way of the distribution of works, is a very serious failure, and one we are very pleased to see the Commission examining action to correct.

However, we must state at the outset that three underlying problems should command the attention of the Commission's copyright policy makers.

These are, firstly, registration of copyright works, which is currently banned as a 'formality' under the Berne Convention. The lack of an official registry is one of the reasons that the problem of commercial 'orphan works' exists today. This complete ban should be re-examined. A requirement to register copyright works after an initial period would be more practical than the current system, given the huge volume of cultural production.

The second underlying problem is that of excessively long copyright terms. In the digital age, when the upfront costs of cultural production are generally much lower, and reproduction and distribution costs are far lower, the justification for long copyright terms is continually diminishing. Yet the Commission chose very recently to pursue a near doubling of term in sound recordings, which if passed, will exacerbate the problems we are seeking to deal with today.

The third underlying problem is the lack of a range of mandatory exceptions, for instance for format shifting or archival scanning, that would ameliorate the situation.

Finally, there is the question of reversion of rights to creators. Currently, creators can find their rights locked by contract and their works being made unavailable. Making it clear in copyright law that unexploited rights must revert to the creator would also help the orphan works problem, as the orphan can be the purchaser of the copyright or exclusive license, rather than the creator.

Dealing with the orphan works problem, this failure of the current copyright framework, is likely to be complex, and poses some serious technical issues, as well as questions about the intent and rights of creators, which now encompasses just about every online citizen.

The digital age also creates the means for every citizen to access any knowledge or culture previously created.

The digital age also provides the means to identify all kinds of works including by audio and photographic matching, as well as voluntarily collect information about rights holders, in order to identify works and pay for them.

Without proper resolution, we both put the European public at a disadvantage compared with other global regions, and we leave the results to be created by a combination of commercial determinations and unlicensed distribution.

We must also remember that we are all copyright holders and creators; that any creative work, including our email and personal photography, is subject to copyright, and may in the future be regarded as 'orphan works'. A personal photograph, for instance, shown to friends on a social networking site, may be regarded as a published, licensed item, and is potentially a commercial orphan work.

We therefore note that we are dealing with a complex matrix of intentions, from the user and creators perspective. Either or both intentions can be commercial, academic or non-commercial, and therefore a single solution to orphan works may not fit everyone equally well.

On the question of payment and license, we therefore start from a perspective that:

- (i) Our objective is the greatest dissemination of works possible;
- (ii) That overheads to any scheme should be small;
- (iii) That the intentions of creators are very important, be they public, private, commercial or non-commercial;
- (iv) That academic, non-commercial or commercial intent of the user may create different public policy objectives;
- (v) That despite this inherent complexity, solutions should be clear, simple and work across Europe with as few barriers as possible

On these grounds, we would favour legislation to establish a copyright exception to allow copyrighted works to be republished in certain special circumstances.

We would favour a solution where:

- (i) An exception would require a publisher would have to show that they had made reasonable efforts to search for the rights holder through specified European rights data bases, and also in the general public realm;
- (ii) An exception would then free a publisher from liability for damages if he has failed despite these reasonable efforts to identify the owner of the rights in a previously published work;
- (iii) An exception would allow rights holders to identify themselves and claim royalties forward of that date for their works;

- (iv) An exception would allow academic reuse of orphan works without commercial payment;
- (v) An exception would allow commercial reuse of commercial works, arguably including some payment, possibly kept in escrow for the rights holders for a specified period;
- (vi) An exception would respect that works previously published under non-commercial licenses or circumstances would remain non-commercial;

And then:

- (vii) The reuse of a work should be for reproduction only, in a manner which is sensitive to and in keeping with the original intent; and
- (viii) The reuse must respect the moral rights of the authors.
- (ix) Works that have never been intentionally published have to be treated very sensitively. Privacy questions as well as historical value of works would be particular concerns.

On the question of payment for use of commercial orphan works, we are not completely opposed to the principle of payment, but we are wary inasmuch as payments will be unlikely to reach their creators.

We are opposed to a general, paid-for solution delivered through existing collecting societies. This is for a number of reasons.

Firstly, there are 27 member states – without legislation that is 279 cross border licences. This is impractical.

A licensing solution through collecting societies would re-erect territorial boundaries member state by member state - this goes against everything the internet is, and everything the European Union is attempting to achieve. With the Union about to establish full competency over intellectual property issues, we should be looking to harmonise our approach to copyright, and remove the obvious barriers to trade it currently imposes.

Monitoring and ensuring value for money from collecting societies across Europe could prove to be impossible. We do not believe this is a task the Commission wishes to take on.

Overall, we are ready to restate that this is a complex issue, but one that must be addressed.

The underlying problems with copyright should be addressed, such as term and registration.

The academic, cultural and economic benefits of an orphan works solution could be very high, and the changes in technology demand that a solution to the problem of orphan works be found.