



EUROPEAN
VISUAL
ARTISTS

Written Submission to the Public Hearing on Orphan Works on 26 October 2009 in Brussels
By Prof. Dr. Gerhard Pfennig, speaker on Panel 1: Orphan Works, Challenges and Opportunities

EVA is the international organisation of CMOs for the Rights of Visual creators: Artists, photographers, graphic designers

I. Orphan works

1. The issue of “orphan works” is not an issue of the information society; it has been a problem for the licensing business of EVA - CMOs since a long time for different categories of works: (excluding literary works and musical works).

The present activities of the EU are limited to the use of orphan works in the context of printed publications but I think we need to discuss the issue in a larger framework; in this regard I ask for your understanding if I exceed the frame.

2. Databases of museums, audiovisual works collections and archives have the same importance for the visual and audiovisual works and should be taken in consideration as well,

3. The uses this institutions intend to make concern the making available right of authors and neighbouring rights owners; the digitisation itself is in many cases subject of legal exemptions and no further issue of this presentation, even if mass digitisation through libraries might pose new problems considering these exemptions.

II. Categories of “Orphan” works

1. Works of visual art

Situation:

- Works imbedded in print publications are normally licensed on the basis of non-exclusive contracts; the problem of orphanity arises when it comes to uses of these works in the audiovisual or online environment. In these Cases the authors keep the licensing power concerning the making available right. They or their collecting societies are the licensors.
- Works are normally identified by the author’s name, but as a lack of dresses is common a source for contact details is needed;
- Licensing has normally an economic value; the fact that an artists – or a photographer - is not known doesn’t indicate that he is not interested in an equitable remuneration for the use of his right; in most cases he just doesn’t know that his work is considered orphan as a result that he has not been informed by the first user how and were the reproduction of his work has been stored;.

The problems arising are the following:

- Publishers and online service providers need legal certainty, works are not used, data bases remain unused.
- A risk that works are used without aquiring licenses counting on the weakness of authors to track illegal uses or
- Users refrain from uses for instance by leaving pages with images systematically black resp. white.

2. Photographic works

Situation:

- a part of licensing contracts is based on exclusivity, others are licensed on a non-exclusive basis; their use remains under the control of the author; it is difficult to find out the actual licensing situation.
- works are often not identified by the authors name, in particular before 1980, the advent of founding CMS in the visual field improved the situation as public interest for the protection of photographs grew
- date of creation is unknown,
- protection term is unknown as a result of the implementation of the 1993 EU directive on protection term which “revitalized” the protection term of photographic works in some member countries
- authors and publishers have the common problem in a solution of the orphan works problem in order to make licensing easier

Result:

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- photographic agencies are and in some cases publishers are not sure about the rights they are licensing and about their licensing partners (photographers) because of the protection term problem
- publishers and online service providers are not sure about the rights they are acquiring and ,if they work correctly, refrain from using interesting works
- large number of photographs are used without acquiring licenses
- authors don't get their licenses because they are too weak to enforce their rights after detecting the use of a work assumed to be “orphan”

3. Audiovisual works

- According to most copyright legislations authors and performing artists have to assign the exploitation rights to the producers or TV-stations; in some countries they have in return a legal right to remuneration:
- Works are normally identified through the names of authors, artists and producers, but not all data are stored in databases as soon as new identification instruments such as identifying number like the ISAN – number are not introduced on a broad basis;

Consequence

- TV- stations administrate large databases containing audiovisual works without keeping licensing data i.e. addresses of rightsowners; they are not able to sublicense uses of these works to other interested parties or to exploit these works in new ways of exploitation

Result:

- large quantities of audiovisual works cannot be made available, if the TV station respect authors rights
- users run the risk of paying high indemnification fees if they use works without proper identification and licensing

4. Literary works

We refrain from commenting the situation as there are organisations present in the hearing which are far more qualified to take position.

5. Musical works

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As a consequence of the description of the status quo we need to discuss how we can find a solution of the proplem of handling the legitimate use of orphan works.

III. Aspects of a solution

The sector specific due diligence search guidelines from 2008 and the MoU within the frame of the HLG on the European Digital Library are a useful starting point. The particularities of the visual sector are included in the reports. Every solution has to make sure that the fact of international distribution of works is covered.

1. In order to identify properly whether a work is “orphan” we have to establish a standardized methodology

- of identification of works or publications using existing databases of works, administered through libraries, archives and professional organisations of publishers or producers;
- of identification of authors or rightsowners using the databases of CMOs organized on an international basis following the recommendations of international organisation such as CISAC or IFRRO and Online Art - using identifiers and systems such as IPI, IDA, ISAN
- of matching different identification systems to combine different resources of data

2. We have to define on a national or international basis

- a legislative framework to be set either on national or EU level,
- which could develop the present system of issuing exclusive licenses with exceptions settled by legislation
- or could introduce a new model on the basis of the “extended collective licensing system in place in the Nordic countries.
- in order to establish a legal assumption that an authorized organisation is enabled to issue valid licenses on behalf of the author of the “orphan” work,
- leaving the author or the rightsowner of an orphan work the possibility to receive the remunerations and licence fees collected on his behalf and to administer future uses him- or herself.
- indemnify users from any additional claims for uses provided they were licensed by an authorized body

3. We have to set standards

About the qualification and selection of the organisation qualified to handle the licensing making sure that the use of “orphan works” is handled in the same way and under the same conditions than the licensing of works whose authors or right owners are well identified.

- Normally CMOs specialized in the day to day administration of certain repertoires are best qualified to administer additionally the licensing of works who are identified to be “orphan”
- They can apply the same licensing schemes to works and “orphan works”, making sure that no user makes a profit out of using orphan works
- CMOs represent authors, performing artists and publishers / producers on the basis of representation contracts mutually on a worldwide basis and can thus solve the distribution of royalties among the different rightowners using their distribution techniques,

4. We need to agree on a special management

Of the license fees or remunerations collected through the organisations authorized to license orphan works

- The authorized organisation has to try to identify the rightsowner using its own databases and its international network;
- It has to keep license fees for an identified period of at least 5 years in escrow for the rightsowner or his estate

An important question is how to handle remunerations we cannot be distributed during this period:

- On a legal basis the organisation / CMO should after the expiry of this term use the remunerations collected for purposes of cultural funding or enforcement of the licensing structures in order to improve licensing and rights administration as well as the access of the public to protected works on a safe licensing basis in the best way.

Prof. Dr. Gerhard Pfennig
EVA
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Public Hearing on Orphan Works EC DG Internal Market,

1. Panel – Orphan Works – Challenges and Opportunities

Speaker: Prof.Dr.Gerhard Pfennig, EVA

**EVA is the european organisation of CMOs representing
the rights of visual creators - artists, photographers,
graphic designers**

Orphan works

1. The issue of “orphan works” is not an issue of the information society; it has been a problem for the licensing business of EVA-CMOs since a long time for different kinds of uses –analog and digital
2. We are talking not only about libraries but as well about archives and databases accessible through the internet
3. We are talking about different categories of works

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Conrad Felixmüller,
Kinderbewahranstalt
von Klotzsche,
1924,

© VG Bild-Kunst,
Bonn 2009

II. Categories of works which are interesting in the context of the “Orphan” works debate

1. Works of visual arts
2. Works of photography
3. Audiovisual works
4. Literary works
5. Musical works

III. Aspects of a solution

1. Identify whether a work is “orphan”
2. Define a national or international legal framework of licensing the use of orphan works on the basis of an assumption of the licensing capacity of the organisation that issues the license
3. Set standards about qualification and selection of the organisation qualified to handle the licensing ensuring that the use of “orphan works” is handled in the same way and under the same conditions as the licensing of works whose authors or right owners are well identified
4. Agree on the management of the license fees or remuneration collected by the organisations authorized to license orphan works

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