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Orphan Works

European libraries have for a number of years recognised that the lack of legislation regarding orphan works is *one* of a number of issues that prevent European citizens from accessing online European culture. This is important because for the education and research sector, access to knowledge, and knowledge in *all* its forms, is one of the fundamental pre-requisites of the knowledge economy.

For this reason libraries believe that harmonised pan-European legislation on orphan works, in combination with other activities which I will talk of later are needed to further stimulate the digitisation of European culture.

Respect of copyright and beyond

I would also like to emphasise the fact that legal deposit libraries have a deep respect for not only copyright, but also moral rights, traditional knowledge and issues pertaining to the reuse of all culturally sensitive material. As guardians, as it were, of the national cultural memory it is important that any solution does not address simply the economic interests of certain groups but creates a broader sense of legitimacy around the digitisation activities of libraries.

An international solution

The collections of many of the larger national libraries and other cultural organisations are international reflecting the long links European countries have had with their neighbours as well as countries beyond the borders of Europe. The internet of course knows no physical or indeed linguistic boundaries. Any European solution or orphan works must therefore be truly international – we must avoid re-erecting borders, and member state by member state barriers to access, where they have long gone in the physical world. The solution must also create legal and reputational certainty for libraries – for reasons just mentioned this must also be international in scope, not just European.

An exception in national and European copyright law to the monopoly rights created by copyright along the lines we see proposed in America would provide for this. Or, a licence *from government* as we see in Japan, Canada and potentially in the UK, will similarly provide, in an instant, legal and reputational clarity for libraries and other cultural institutions. Simplicity and clarity will promote digitisation – our goal.

Of course the first truly global extended collective licensing scheme for orphan works proposed is the American Book Rights Registry as part of the Google Book Settlement. Under Berne there is nothing that prevents Americans representing the interests of foreign authors and publishers. Irrespective of

the rights or wrongs of the case, we have seen European opposition to the registry in terms of its national composition and make-up.

The library and academic world also knows well how national collective licensing solutions can be challenged and undermined as has been the case in Germany with the Subito case where the German collective licensing solution for the provision of articles for researchers was opposed by specific publishers in the German courts for many years.

If a member state by member state collective licensing solution to orphan works is proposed, what is to prevent similar opposition to that which we have seen in America or Germany?

Licensing by definition creates a complex web of permitted activities, obligations, and specific restricted activities. These often reflect geographic and linguistic boundaries, existing analogue market segmentation, as well as differing member state by member state traditions and business models stretching back decades. It is important that we avoid in a unified single Europe different licensing terms being offered to say the British Library to that of say the libraries of Germany, Sweden, Luxembourg or Spain. Something touched upon in Viviane Reding's Lisbon council speech where she expressed frustration at the growth of Europeana due to Europe's "fragmented regulatory system."

Without legislation, even with just one collecting society per member state, which is not the case of course, with 27 member states this would require over 279 reciprocal cross-border licences? How is this possible let alone cost effective?

With legislation reciprocally recognising member state collective licensing solutions, in order to avoid national silos as we must, who will monitor the licensing activities of these organisations to ensure a pan European level playing field with uniform terms and conditions is created? Would such a licensing scheme have to be mandatory to avoid excessive exploitation of the new monopoly right created? Or do we envisage one pan-European clearing mechanism – and if so how could such a body be representative – representativeness being the principle underlying extended collective licensing.

In a single market, with one global access point we must strive for uniformity, simplicity and equality in any European solution. Any solution must also be as robust within Europe as beyond our borders. A pan-European US style exception based in statute, or perhaps a standardised supra-governmental licence, would appear to provide most legal and reputational certainty and therefore be the best tool to stimulate digitisation.

Legitimacy

Any solution must in the minds of all rightsholders provide legitimacy in regards to copyright, cultural sensibilities, moral rights and traditional

knowledge – something a commercial solution does not easily provide in many instances.

In certain cases the availability of a licence to use orphan works from an organisation representing similar rightsholders *does* provide legitimacy for cultural institutions. The availability of a licence from a UK collecting society for the digitisation of French, English and German novels from the 1960s, also including orphan works, will save the institution time and money searching for rightsholders difficult to find. The search will also be performed by an organisation that specialises in this area and has links with the groups, in this case commercial authors, that form the body of the works to be digitised. The rightsholders also define themselves in commercial terms. This I think raises relatively few questions.

In other cases there are I think strong questions around legitimacy that will potentially affect the ability of a cultural institution to grow, develop and curate its own collections. One example of this is a project from the British Library where we digitised unpublished recordings of traditional British music. Few of the performing individuals identifiable are on the databases of any collecting societies, the work that was recorded and subsequently digitised was not produced with commercial purposes in mind, and the artists are interested primarily in dissemination of their work. As an organisation that curates collections, and interacts with many communities such as this – we risk alienating these groups by commercialising their non-commercial creative output if we were forced to take out a fee-based licence. We jeopardise therefore our own legitimacy as a cultural institution.

It would also seem inappropriate that reasonable activity to locate such rightsholders, is handed to another organisation to do, when we have much closer links ourselves to such communities as we work closely with them, know the provenance of the object to be digitised, and need to engage with the communities to ensure the moral and cultural sensibility issues are covered off adequately.

Commercialisation via licence

One thing that the JISC report “Orphan Works: In from the Cold” makes clear is that the many of orphan works in cultural institutions were not created with commercial intent in mind. To name but a few many oral histories, unpublished performances, grey literature, traditional knowledge material, personal, governmental and corporate archives etc etc etc. Any solution must therefore reflect this fact – a commercial solution in some instances is appropriate, but in some instances it is not. We must avoid the prospect of commercialising all culture and treating everything the same. We must respect the interests of each and every creator.

In terms of commercialisation, we must also be mindful of the fact that any monies paid in the way of licence fees will most likely detract from the ability of libraries to digitise. How are we to ensure pricing in the event of a civil law style exception or a collective licensing solution is reasonable and

appropriate? Any fee based solution must not undermine the very activity we are trying to promote – namely digitisation.

Historical Cut-Off Points

Moving on from the issue of orphan works, we believe the Commission also needs to focus on the issue of term of copyright. This is yet another contributing factor to the number of Orphan Works that sit within memory institutions – according to JISC statistics potentially over 50 million in the UK alone.[1]

In America pre -1923 books are in the public domain – and for this reason America has a huge competitive knowledge advantage – as taking the example of Google alone, it is estimated that 500,000 books are being blocked from view in the EU due to our longer period of copyright for historical material.

We therefore call upon the commission to promote mass digitisation by facilitating discussions between rights-holders and libraries with an aim to establish sector by sector / type of work by type of work historical cut-off dates that libraries would be able to digitise up to.

In summary therefore I recommend to the Commission the following three points:

1. Introduce a harmonised mandatory pan-European exception along the lines that we see in the US with a safe harbour for cultural institutions for non-commercial research purposes. This will create legal, financial and reputational certainty – it will create one single European solution, that works beyond our borders, and provides the strongest mechanism to prevent legal challenges to orphan works digitisation. Of course such an exception must be prevented from subsequently being undermined by private contract law.
2. In order to respect the interests of all creators and authors any solution must make a distinction between works that were created with commercial intent in mind and those that were not, and in terms of reuse those that are educational in intent, and those that are purely commercial.
3. Orphan works are not a stand alone category of work - for 20th century commercial material cultural institutions will most likely be licensing in-copyright material for mass digitisation from a collecting society anyway. It would seem sensible that where this is the case, that in return for a supplemental fee and the collecting societies performing a reasonable search amongst their communities, that a licence available for certain types of orphan works would be a desirable option. I therefore recommend that the Commission should also, as part of an exception, explore the encouragement of a pan-European scheme

[1] In from the Cold - An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public.

where collecting societies can offer orphan works licensing schemes that could be used to **supplement** the existence of a straight US style exception in law.