

## Public Hearing on Orphan Works, Brussels, 26.10.2009

### Report

***The October 26, 2009 hearing on orphan works confirmed three long-standing assumptions on these works. First, the orphan work issue is linked to the lack of appropriate attribution of authorship in many creative sectors, especially in the area of visual art and photography. Second, orphan works were mainly qualified as older works where copyright term by far exceeds their 'commercial' life. Third, the less commercially successful a work proved to be, the more administrative effort was necessary to search for possible authors.***

The hearing also confirmed the 'divide' identified in our public consultation on the Green Paper on the Knowledge Economy. While libraries and internet search and archiving companies (Google, the Internet archive) favour a statutory exception allowing cost-free digitisation of orphan works, publishers believe that digitisation of such works should be subject to prior permission. As the lost parent of the orphan would be unable to grant authorisation, the publishing industry and collecting societies suggest that this authorisation is granted by the collecting society representing authors of the same category as the orphan.

But libraries question the fee to be paid for the digital use of an orphan. They express concern whether a collecting society should in fact be able to represent right owners who are unknown; whether it is even fair to pay a fee upfront to a collecting society for works whose owners may never claim the orphan work; what to do with the money that accumulates and remains unpaid in the event that right holders never reappear; whether a collecting society, after having received the license fee for the use of an orphan would have any incentive to actively search for the orphan.

They also query whether a distinction should be made between uses that are for commercial purposes and those that are exclusively for research and education; whether a distinction should be made between published and unpublished orphan works; how to ensure that the costs of whatever constitutes a "reasonable" due diligence search do not outweigh the benefits of digitising the orphan work. Coupled with these issues is the fact that each sector (books, music, film, sound recordings, photographs, visual art) exhibit their own specific characteristics so that a one-size fits all approach to orphan works may not be feasible.

In these circumstances, libraries- notably EBLIDA and the British Library - call for a legislative solution or a statutory exception. They further identified the need to couch the problem in terms that would make a distinction between commercial uses and non-commercial uses such as those for education and research. This was especially pertinent in view of the fact that much of what is contained in library collections and archives is in fact material that does not have an intrinsic commercial value or appeal but whose value is more academic or cultural.

At the same time, both sides acknowledge difficulties relating to rights clearance for orphan works. Both further recognise that a reasonable, good-faith due diligence search to locate the

owner of an orphan and/or their heirs should be undertaken prior to using an orphan work in the context of online libraries. Both sides recognise that users of orphan works should be protected from liability for copyright infringement in the event that a right holder would reappear.

Many participants encouraged the systematic collection and storage of information on copyright ownership, the creation of an international registry containing information about copyright status of works. Registries were seen as facilitating a diligent search and prevent the birth of orphan works in the future. There was general support for the creation of central databases such as the EU-funded ARROW database which will provide users who want to digitise their collections with information on the status of protected works and recognition that registration in such a database would prevent the emergence of orphans in the future.

The results of the hearing will flow into the impact assessment on orphan works. Participant's detailed contributions can be consulted below: