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Opinion

Title

Impact assessment on the cross-border online access to orphan works

(draft version of 19 May 2010)

(A) Context

Orphan works are works or other protected subject matter where, despite a diligent search, the rightholder(s) cannot be identified or traced. Prior authorisation by the rightholder is normally needed for online display under EU copyright law but it cannot be obtained in the case of orphans. European libraries currently display few orphan works online, and are believed to be unwilling to risk infringing copyright. Most Member States have not yet developed an approach to permit the lawful display of orphans by libraries. Moreover, none of the existing approaches allows for cross-border access to orphan works. This 'orphan works issue' hinders the EU digital library *Europeana*, part of the Digital Agenda for Europe initiative which itself forms part of the Europe 2020 Strategy.

(B) Overall assessment

The report needs to provide a clearer justification for the chosen scope of the initiative and to better demonstrate the benefits of the proposed action in relation to the cross border online access to printed orphan works. This justification should explain (i) why the scope is limited to print works, given that Europeana covers text, image, sound and video works; (ii) how this initiative fits into the broader context of planned measures for copyright in the 'digital age' (iii) what the potential impact is if the US/EU gap in digital access to printed orphan works widens. The report should also distinguish between printed and other works in terms of the availability of diligent search guidelines. Further analysis should be added to demonstrate that solving this legal problem will bring tangible benefits at limited cost. Additionally, the stated objectives should be amended to recognise the importance of respecting ownership rights.

(C) Main recommendations for improvements

(1). Give a stronger justification for the scope of the initiative and explain more fully the context. The report should present upfront all the justifications for limiting the initiative's scope to print works while excluding image, sound and video works that are covered by Europeana. It should discuss the trade-off between a swift but limited action covering only print works and a slower but more comprehensive one. An explanation should be provided of: a) the distinction between printed and other works in terms of the stage of development of diligent search guidelines, b) the approach of EU law and its respect for ownership rights. More analysis should be provided about the potential short and long term impacts if the US/EU digital access gap widens, such as on innovation, to demonstrate the urgency of reacting to the work of Google on display of print orphans. The wider context should also be better outlined by listing related initiatives on, for example, libraries, prevention of orphans via registers, commercial usage. In short, the report should substantiate the following points to underpin the case made during the meeting with the Board on the benefits of swift action to provide legal clarity on orphan print works:

- diligent search guidelines exist for print works but are far from ready for other works,
- it is likely that many orphan print works would be displayed after this initiative as libraries are able to meet the extra costs of display (libraries could cover the costs of procedures like diligent search that reduce legal liability and/or such costs would be insignificant, libraries could or already have covered digitization costs),
- the approach could integrate other types of work later,
- a wider gap in access to orphan print works for EU citizens compared to US citizens could have a serious impact (e.g. as would arise if the Google Books Settlement is finalised) not least because text searches are especially valuable to researchers and to universities' competitiveness.

(2). Demonstrate that benefits will flow from addressing this specific legal problem.

The report should substantially develop the case that tangible benefits will arise from enabling the lawful online display of orphan print works by libraries, and give supporting evidence. To do so, it should clarify the extent to which the cost of procedures to reduce legal liability such as one-off or multiple diligent searches could still present a serious barrier to online display. The report should explain how the current diligent search guidelines for printed works were established, the search cost and process, and the number of already 'verified' orphans in the database linked to these guidelines. It should also briefly explain digitization approaches and progress, and the extent to which public libraries already have the necessary funding. Moreover, the report should attempt to give a sense of the untapped potential from already completed work on diligent searches and digitization (i.e. clarify the extent to which costs have already been 'sunk' on this issue, but exploiting the full potential benefits requires the legal changes proposed). The supporting information about current regulatory practice by Member States should be expanded, and their reasons for not acting indicated.

(3). The stated objectives should include the need to ensure continued recognition of ownership rights. As the assessment involves balancing ownership rights with libraries' ability to act in the public interest, such rights should be referred to in the objectives.

(4). Clarify the content and practical impact of options. The report should make clear what legal instruments would be used to implement the options and what the

implementing structures would be. It should clearly identify for which options the current voluntary guidelines for diligent searches would become legally binding. It should seek to describe impacts in practical terms, covering diligent search where applicable and also coherence with other policies and laws. The report should clarify what stakeholder opinions were for each option. It should also provide a more precise explanation of concepts used such as 'workability' and liability. The report should state whether EU budget impacts are expected to arise in connection with any of the options.

(D) Procedure and presentation

The standalone Executive Summary should be significantly expanded to meet the IA guidelines. Stakeholder views should be indicated for each proposed option. The report should be as precise as possible in its use of terms like 'orphan', for example about whether presumed or verified orphan works are being discussed.

(E) IAB scrutiny process	
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External expertise used	No
Date of IAB meeting	16 June 2010