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The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It*

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Introduction

'New technologies breathe new value into old content' (Atwood Gailey 1996: 27). The history of the media provides ample illustrations of this simple truism. The breakthrough of television broadcasting in the 1950s and 1960s created huge secondary markets for existing cinematographic works. The proliferation of video recorders in the 1980s gave new life to popular television programmes (e.g. Monty Python's Flying Circus), and further increased the commercial lifespan of movies, new and old. With the introduction of each new medium, a new shackle is added to the existing 'chain of exploitation'.

New digital media provide unprecedented opportunities for reutilizing 'old' existing content. Classic films may be reissued on DVD; hits from long forgotten artists may be re-released on compilation CD's; archived television news items may serve as input to multimedia encyclopaedias; old photographs may be incorporated into digital collages; film clips may become part of computer games or educational software; newspaper articles may be republished on internet websites; etc.

Digitization also allows broadcasting organizations, archives and libraries to create vast digital repositories of pre-existing audiovisual content. Examples include the BBC Creative Archive that offers UK viewers full online access to old BBC television and radio programmes (bbc.co.uk/creativearchive); and the INA-Média-Pro database which provides professional users online access to the digitized contents of the Institut National de l'Audiovisuel (the French National Audiovisual Institute – INA) (www.inamediapro.com).

Digitizing existing content usually involves works protected under copyright, as well as performances protected by so-called neighbouring rights, i.e., rights related to copyright.

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Although national copyright laws in Europe often allow archives and libraries to engage in acts of digital archiving without the consent of the rights holders concerned,[1] permission is usually required if the digitized content is to be disseminated or otherwise made available to the public. Apart from relatively rare situations where the content is in the public domain,[2] a prospective user is required to clear all the rights for the use(s) he wishes to make. This process of clearing rights will be obstructed if one or more rights owners remain unidentifiable or untraceable after a reasonable search has been conducted by a person intending to use this work. This, in a nutshell, is the problem of 'orphan works', the topic of this article. Being unable to acquire permission from the rights owner(s) concerned makes it impossible to legally reutilize the work. This is especially problematic when it comes to works of multiple ownership, such as television productions or other audiovisual works, for which numerous rights owners might need to be traced in order to negotiate and secure permission for using these works.

By impeding the clearance of copyright and related rights, the orphan works problem may frustrate entire reutilization projects and prevent culturally- or scientifically-valuable content being used as building blocks for new works. To unlock the potential of pre-existing content, therefore, it is essential that legal solutions be provided to adequately address this problem (High Level Expert Group on Digital Libraries 2008). The need for solutions to the orphan works problem has been recognized at the European policy level, both by the European Union and the Council of Europe. As part of the 'i2010: Digital Libraries' initiative, the European Commission has adopted a Recommendation on the digitisation and online accessibility of cultural material and digital preservation[3] which calls upon the Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of known orphan works and works in the public domain. In response to the Recommendation, the European Council invites Member States to have mechanisms in place to facilitate digitization of, and online access to, orphan works by the end of 2008. The Commission is invited to propose solutions for certain specific rights issues, such as orphan works, and to ensure their effectiveness in a cross-border context (European Council 2006).

In the same vein, the Council of Europe has invited its Member States to examine and, if appropriate, develop initiatives to remedy the situation where it proves to be impossible for public service broadcasters to obtain the necessary authorizations and to clear the necessary rights for the exploitation of protected radio and television productions held in their archives, among other things, because not all rights holders involved can be identified (Council of Europe 1999).

This article examines and evaluates possible solutions to the orphan works problem. First, the following section defines orphan works and estimates the actual size of the problem. Next, six different possible solutions to the problem are described and assessed, pointing out

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[1] Art. 5(2)(c) of the EU Copyright Directive provides for an exception in favour of archives or publicly accessible libraries, educational institutions or museums, to make specific acts of reproduction for non-commercial purposes. This allows Member States to introduce a statutory exception to permit these institutions to make – analogue or digital – reproductions for purposes of preservation or restoration of works available in their collections. Most European countries have adopted provisions of this kind. EU Copyright Directive – Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22 June 2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> Accessed 29 September 2009.

[2] In Europe and the US copyright expires 70 years after the author's death. Neighbouring rights expire 50 years after the performance of a work, or 50 years after the first publication of a sound recording.

[3] Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, OJ L 236/28, 31 August 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:236:0028:0030:EN:PDF> Accessed 29 September 2009.

advantages and drawbacks to each model. Finally, a brief conclusion suggests our preferred solutions.

Orphan Works

An orphan work can be defined as a copyright-protected work (or subject matter protected by related rights), the rights owner of which cannot be identified or located by anyone who wants to make use of the work in a manner that requires the rights owner's consent. Where the rights owner cannot be found, even after a reasonably-conducted search, the prospective user has no choice but to either reutilize the work and bear the risk of an infringement claim or to abandon his intention to use the work. In the latter case, a productive and beneficial use of the work will be forestalled. This is clearly not in the public interest, in particular where the rights owner, if located, would not object to the use of his work (US Copyright Office 2006: 15).

The actual size of the orphan works problem, in economic and social terms, has yet to be assessed. At the EU level, two major consultations were organized in which this question was addressed. On the basis of a Commission Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works, stakeholders in the audiovisual field were asked whether they faced any difficulties in identifying rights holders which create obstacles to the exploitation of audiovisual works (European Commission 2001a). In the context of the 'i2010: Digital Libraries' initiative, the Commission asked stakeholders whether they perceive the issue of orphan material to be economically important and relevant in practice (European Commission 2005).

Neither of these consultations has resulted in firm quantitative data. Although there are estimates that well over forty per cent of all creative works in existence are potentially orphaned (British Library 2006), this has not been corroborated by solid data. The consultations only reveal that the issue is perceived by several stakeholders, particularly by audiovisual and cultural institutions (mostly public broadcasters, libraries and archives), as a real and legitimate problem (European Commission 2001b: 14).[4] No hard evidence was provided, however, on the degree to which orphan works present a problem for the actual use of these works or on the frequency with which orphan works impede creative efforts.

When assessing the problem of orphan works, it must be emphasized that the question of finding a rights holder is first and foremost a matter of conducting a thorough search. Although tracing rights holders may sometimes be a laborious and costly task, a potential user is nevertheless obliged to spend sufficient hours and resources in seeking a licence. It is completely normal and inevitable that transaction costs are involved in the process of rights clearance. Legal solutions to the orphan works problem, therefore, should not be informed by the desires of stakeholders for whom a reasonable investment in rights clearance is not a priority. Regulatory or legislative intervention can only be justified to the extent that there is a structural impediment.

Possible Solutions to the Orphan Works Problem

In addressing the issue of orphan works, several alternatives may be considered. These alternatives, which can be grouped into six categories, are discussed below.

[4] Results online consultation 'i2010: Digital Libraries', <http://ec.europa.eu/information_society/activities/digital_libraries/doc/results_online_consultation/en.pdf>, p. 5.

1. Rights Management Information

The orphan works problem is first and foremost an information problem. The difficulties in locating rights owners are largely caused by a lack of metadata: (1) not all works carry a statement indicating the authorship or copyright ownership of the work; (2) the copyright ownership information on the work may be outdated due to a change of ownership; and (3) there is a general lack of adequate copyright registers or other publicly accessible records. Any forward-looking solution to the orphan works problem, therefore, should include mechanisms that encourage the supply of rights management information[5] (metadata) to the public. If adequate metadata are made publicly available, this could lower the transaction costs that are involved in identifying rights holders and thus facilitate the clearance of rights.

Introducing a statutory obligation upon authors or rights owners to provide information on copyright ownership, however, would be at odds with the norms of international copyright, in particular the Berne Convention for the protection of literary and artistic works (Berne Convention), if this would make the existence or exercise of copyright contingent upon formal requirements. Except for purely national situations, it is prohibited under the Berne Convention to establish mandatory registration systems or to mandate a copyright notice, including information on the identity and whereabouts of a copyright owner and the date of copyright, on each copy of the work. On the other hand, it is not prohibited to establish measures that stimulate rights owners to voluntarily provide information concerning copyright ownership and licensing conditions.

A number of measures could be employed to promote the voluntary supply of information. First, authors and rights owners could simply be encouraged to provide copyright information, or, for digital works, to incorporate adequate rights management information. With respect to the latter, an important role could be played by DRM (digital rights management) systems. Since DRM systems may include large databases of rights management information to support the process of authorizing and monitoring the online use of copyrighted works, such systems might contribute to a significant extent to efficient rights clearance in the online environment.

In addition, authors or rights owners might be encouraged to offer Creative Commons (CC) (creativecommons.org) licences or similar 'open content' licences. CC licences are standardized licensing and contract schemes that rights holders can attach to a work, permitting any possible user to use the work under the specific terms of that licence. Rights holders can choose between a variety of CC licensing terms, allowing them to decide a priori under what conditions they would allow the reutilization of their works and which rights they would thereby wish to reserve. As the CC licensing conditions are subsequently attached to copies of the work, this creates transparency for the prospective user and thus facilitates the licensing process considerably.

Finally, rights holders could be induced to voluntarily record ownership of copyright in databases established and maintained for the purpose of providing information regarding the copyright status of works. Such an initiative could consist of facilitating either the creation of rights management information databases by public or private entities (e.g., cannesmarket.com), or the establishment of voluntary registration systems under national copyright law (WIPO 2005) or international copyright law (WIPO Film Register Treaty). In

[5] Rights management information covers not only information identifying the work, the author and the copyright owner, but also information indicating the terms and conditions of use of a particular work, and any numbers or codes that represent such information. See Art. 7(2) EU Copyright Directive.

this respect, an important role could be played by collecting societies, i.e., organizations that are mandated by rights owners to collectively license the use of their works, for instance for radio broadcasting (of musical works) or for educational photocopying (of scientific articles). Given that they already hold large records of rights management information relating to the works they represent, collecting societies seem to be naturally positioned to play a key role in this regard.

However, while enhancing the supply of rights management information is perhaps an effective way of diminishing the orphan works problem in the future, such measures cannot provide a complete solution to the current problem as for many 'old' works the required information is simply unavailable. Therefore, other measures need to be considered as well.

2. Extended Collective Licensing

A second alternative would be to stimulate the collective management of copyright in works that are most suitable for digital reutilization. This would have the advantage that, because of the concentration of rights holders in a collecting society, prospective users would face fewer difficulties in finding the copyright owner whose work they intend to use. Where a collecting society has been established and that society represents a significant part of the rights holders in a given field, there is a reasonable likelihood that the society will also represent the particular copyright owner the user is looking for.

Nonetheless, if the copyright owner is not represented by that collecting society, a user may still face considerable uncertainties. This can be illustrated by the general agreement concluded between INA and five French collecting societies – SACEM, SACD, SCAM, SDRM and SESAM (SCAM 2005) – which authorizes INA to use the collecting societies' audiovisual and sound catalogue, to the extent that it is available in its archive, for any mode of exploitation (including Internet and mobile telephony). Although this agreement greatly facilitates and simplifies the exploitation of INA's archives, it does not cover the repertoire of rights holders who are not members of any of the contracting societies. Consequently, the obstacle remains that INA still needs to identify and locate these, perhaps unknown, rights holders to clear the rights of the works not covered by the agreement (Debarnot 2006: 93–4).

Accordingly, because of the freedom of the rights owner to decide whether or not to authorize a collecting society to represent and exercise his or her rights, a system of voluntary collective rights management as described here would not provide a complete answer to the problem of orphan works. There is a legal technique, however, by which this shortcoming can be overcome. This is the so-called 'extended collective licence', which is applied in various sectors in Denmark, Finland, Norway, Sweden and Iceland (Koskinen-Olsson 2006).

A system of extended collective licensing is characterized by the combination of a voluntary transfer of rights from rights holders to a collecting society with a legal extension of the repertoire of the society to encompass those rights holders who are not members of the society. Statutory provisions thereby give extended effect to the clauses in a collective licensing contract, which is concluded between a representative organization of rights owners and a (certain group of) user(s). A
precondition is that a substantial number of rights holders in a given category are represented by the contracting organization.

In the Nordic countries, an extended collective licence is applied, for example, to musical works for use in radio and television broadcasts. This means that when a broadcaster obtains a licence for the broadcasting of musical works from a collecting society representing a

substantial number of music composers and lyricists, the licence is extended by law to also cover those music composers and lyricists not represented by the collecting society. Hence, the extended collective licence automatically applies to all rights holders in the given field. Normally, the licence applies to both domestic and foreign rights owners. It also applies to deceased rights holders, in particular where estates have yet to be arranged, and to unknown or untraceable rights holders. This greatly facilitates the clearance of rights, since a user may obtain a licence to use all works covered by the licence without the risk of infringing the rights of rights owners who otherwise would not be represented. In fact, the rationale of the system of extended collective licensing has always been to facilitate the licensing in case of mass uses, for which it would be impossible for users to clear all the necessary rights (Olsson 2005: para. 3).

Nevertheless, to protect the interests of rights owners who are not members of the collecting society and who do not wish to participate in the extended collective licensing scheme, the legislation in the Nordic countries provides rights owners with the option to either claim individual remuneration or to 'opt out' from the system altogether (Olsson 2005: para. 6.4). Rights holders who choose the latter are no longer covered by the extended collective licence. Therefore, the Nordic system of extended collective licensing, albeit highly practical and attractive, cannot provide complete certainty to prospective users.

Difficulties may arise, moreover, as to the practical implementation of an extended collective licensing regime. Since the success of an extended collective licence fully depends on the conclusion of contracts between collecting societies that represent a sufficient number of rights holders, collecting societies should already be operating in those fields where the orphan works problem is most pressing. This is currently not the case in all European countries. In the audiovisual field in particular, collective rights management is still rather underdeveloped. Rights owners in this field, such as film producers and distributors, are generally reluctant to have their rights administered collectively, as they generally prefer to exercise their rights individually.

3. Indemnity or Security

Another (at best partial) solution to the problem of orphan works would be to allow a private organization representing rights holders to grant an indemnity or security to a prospective user who, after a reasonable search, has not been able to identify and locate a copyright owner. In some countries there already exist voluntary arrangements of this kind. In the Netherlands, for example, a system is in place whereby a prospective user of a photograph can request Foto Anoniem (fotoanoniem.nl), a foundation linked to a Dutch organization for professional photographers, to assist in finding the copyright owner of a photographic work. To that end Foto Anoniem has at its disposal a vast directory of photographers. In the majority of cases, Foto Anoniem is indeed able to trace the name and address, and to put the user in contact with the photographer. Nonetheless, if the photographer cannot be found, Foto Anoniem will grant the user legal protection by means of an indemnity. In the indemnity clause, Foto Anoniem commits itself to protect the user against liability for copyright infringement. To obtain indemnity, a user must pay fair compensation, which generally amounts to the usual licence fee for publication of a photo. The compensation is kept in reserve to disburse rights owners in the event they are identified.

Although the grant of an indemnity or security provides a measure of legal certainty and relief to users of pre-existing content, i.e. by protecting him or her against financial liability, it does not, as such, prevent a copyright owner from invoking his exclusive rights should he eventually come forward. Despite the indemnity or security granted to the user, a rights holder

could still seek injunctive relief, which would prohibit any further use of the work. It is apparent, therefore, that this alternative does not provide a complete solution to the problem of orphan works.

4. Compulsory Licence to Use an Orphan Work

A more solid way to provide legal certainty would be to allow a user to apply to an administrative body to obtain a licence to use a particular work in those cases where the identity or whereabouts of the rights owner cannot be ascertained by reasonable inquiry. Such a system has been established in Canada (Article 77 of the Canadian Copyright Act). Under the Canadian scheme the Canadian Copyright Board must be satisfied that the applicant has made 'reasonable efforts' to find the copyright owner before a licence is issued. As a rule, a user may request, by a single application, a licence for multiple orphan works. It is not necessary that 'every effort' has been made to trace the rights holder, but an applicant must prove that he has conducted a 'thorough search'. To that end, the Copyright Board advises the applicant to contact different collecting societies and publishing houses; to consult indexes of national libraries, universities and museums; to check registration systems of copyright offices; to investigate inheritance records, and to simply search the Internet (Copyright Board of Canada nd).

Once the Copyright Board is convinced that the applicant, despite reasonable efforts, cannot locate the copyright owner, it may grant a licence, irrespective of whether the work is of domestic or foreign origin. The licence granted permits the applicant to use the copyrighted material without the explicit consent of the copyright owner. The licence is non-exclusive and limited to the Canadian territory. The licence stipulates a royalty fee, which should correspond to an ordinary royalty rate as would have been made in consideration of consent being given. The royalty fee is usually paid directly to the collecting society that would normally represent the untraceable rights owner, but in some cases users are required to deposit the fee into an escrow account or trust fund. If the rights owner surfaces, he may collect the royalties fixed in the licence. If no copyright owner comes forward within five years after the expiry of the licence, the collected royalty fee may be used for other purposes than those relating to the use in question.

Similar regimes exist in Japan, South Korea, India and the UK.[6] The rules, however, vary widely in application and scope. In the UK, for example, the power to issue a licence is limited to the making of a copy of a recorded performance. Not all of these regimes, therefore, provide an inclusive remedy to the orphan works problem.

The main advantage of the Canadian system is that it provides the user with adequate legal certainty about being able to use an orphan work. Where a user is granted a licence, he is authorized to use an orphan work without the risk of an infringement claim should the rights owner come forward. At the same time, the legitimate interests of the rights owners concerned are not unnecessarily compromised. First, a verification of the good faith of a user is performed by an independent public body, which serves the needs of prospective users while taking due account of the legitimate interests of the rights owners concerned. Second, exceptions to the rights of the rights owner are made on a case-to-case basis, thereby avoiding disproportional prejudice to the principle of exclusive rights that is inherent to the copyright system. Third, the licence issued is not all-inclusive, but granted to a particular user for a

[6] Art. 67 Japanese Copyright Act; art. 47 South Korean Copyright Act; art. 31a Indian Copyright Act; art. 190 UK Copyright, Designs and Patents Act.

specific kind of use only. Finally, the system does not result in a loss of income for rights holders. If a rights holder eventually shows up, he is compensated.

5. Limited Liability

Yet another solution would be to introduce a rule that would limit the liability of those users who use an orphan work after an unsuccessful but reasonable search for the rights owner has been conducted. This solution has been proposed by the US Copyright Office (US Copyright Office 2006), and has subsequently been introduced, with some minor amendments, as a bill – the 'Orphan Works Act' – in the US House of Representatives.[7]

In general, the liability rule permits bona fide users who have been unable to identify and locate a copyright owner, to make use of the work, subject to a limitation on the remedies that the rights owner could obtain against the user if he were subsequently to come forward and file a claim. To qualify for this limitation, the user is required to prove that he has performed a 'reasonably diligent search' and, if possible and reasonably appropriate under the circumstances, to provide attribution to the author and copyright owner of the work.

According to the bill, a 'reasonably diligent search' includes, at a minimum, review of the information maintained by the Register of Copyrights. Moreover, to be 'reasonably diligent', a search should normally include the use of reasonably available expert assistance and reasonably available technology. A user cannot be successful in his or her claim by referring solely to the lack of identifying information on the copy of the work. In any event, it is for the court to decide whether a search has been reasonably diligent in the given circumstances.

If a user meets the burden of proof that he has conducted a reasonably diligent search and has provided attribution to the true author or rights owner, a closed set of remedies is available should the rights owner resurface and initiate litigation over the use of the work. First, monetary relief is limited to 'reasonable compensation' for the use made. In general, this reasonable compensation should correspond to a reasonable licence fee, i.e., as would have been established in negotiations between the user and the rights owner before the infringing use commenced. However, where the use was non-commercial and the user expeditiously ceases the infringement upon a notice by the rights owner, no monetary relief is due at all.

In addition, the liability rule provides for a limitation on injunctive relief. Where the orphan work has been incorporated into a derivative work (e.g., a motion picture or documentary film), the copyright owner cannot obtain full injunctive relief to prevent the exploitation of the derivative work, provided that the user pays the rights owner a reasonable amount of compensation and provides for sufficient attribution. Full injunctive relief is available, however, where an orphan work has simply been republished or posted on the Internet without any transformation of its content.

Although a US-style liability rule certainly has its merits, it is questionable whether such a rule would substantially improve the legal position of users of orphan works in Europe. In sharp contrast to the United States, pecuniary damages in most European countries for acts of copyright infringement are relatively low, and usually amount to no more than the amount of

[7] Orphan Works Act of 2006, H.R. 5439, 109th Congress, 2nd Session, 22 May 2006. The bill died with the end of the Bush presidency. Later two other bills were introduced, i.e., the Orphan Works Act of 2008, H.R. 5889, 110th Congress, 2nd Session, 24 April 2008, and the Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Congress, 2nd Session, 24 April 2008. Both of these bills are still pending.

the license fee a rights holder would have received if permission were granted in advance.[8] Only to the extent that the liability rule would also limit injunctive relief, as in the US proposal, would it improve the legal certainty for users who incorporate an orphan work into a derivative work.

6. Statutory Limitation

A final alternative would be the introduction of a statutory exception or limitation that would allow the reutilization of orphan works under certain strict conditions. This solution has been proposed by the British Screen Advisory Council (BSAC) (HMSO 2006). The essence of the BSAC proposal is as follows. If a person has not been able to find the copyright owner of a work after having made 'best endeavours' to trace him, that person may use the work under the proposed exception to copyright. Whether someone has made 'best endeavours' is to be tested and judged against the particular circumstances of each case.

A precondition for the proposed exception to apply is that the work is marked as used under the exception. This should alert a rights owner who emerges that the work has been used under the exception and that he may claim the 'reasonable royalty' to which he is entitled, rather than sue for infringement. The amount of the royalty should be agreed by negotiation. If the parties cannot reach agreement, BSAC sees a role for the UK Copyright Tribunal to establish the amount to be paid.

Once the copyright owner has emerged, a user who intends to continue using the orphan work would need to negotiate the terms of use with the rights owner in the usual way. Where the work has been integrated or transformed into a derivative work, however, it would be unreasonable if the rights owner could prevent the further exploitation of the entire work by simply refusing permission to use the work in question. BSAC proposes that, in such cases, users should be allowed to continue using the work provided that a reasonable royalty is paid and sufficient acknowledgement is given to the rights owner.

Although the BSAC proposal certainly has its merits, from a perspective of EU law, the proposal is unrealistic since Article 5 of the EU Copyright Directive, which has harmonized limitations and exceptions in all Member States of the EU, does not permit this type of exception. Moreover, it is not sure whether such an exception would pass the 'three-step test' of Art. 5(5) of the Directive, which sets general limits to the scope and breadth of statutory limitations and exceptions of copyright.

Conclusion

Of the six possible solutions to the orphan works problem, two seem to stand out: the Nordic model of extended collective licensing, and the Canadian system of compulsory licensing. While the Nordic model has the advantage of steering close to the tradition of collective rights management that has a proven track record particularly in Europe, the Canadian model provides maximum legal certainty. As the problem of orphan works becomes more acute and threatens to undermine increasing numbers of digitization projects, it is hoped that national legislatures in Europe and elsewhere, inspired by either of these models, introduce legislative solutions.

[8] In the US, users face the risk of becoming liable for payment of statutory damages of up to USD150,000 for each wilfully committed infringement (Art. 504 US Copyright Act). In Europe, on the other hand, damages are ordinarily based on the actual losses incurred by the infringement.

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