

RIGHTS CLEARANCE ISSUES IN ORPHAN WORKS

The i2010 digital libraries initiative and the
abolishment of copyright landmines

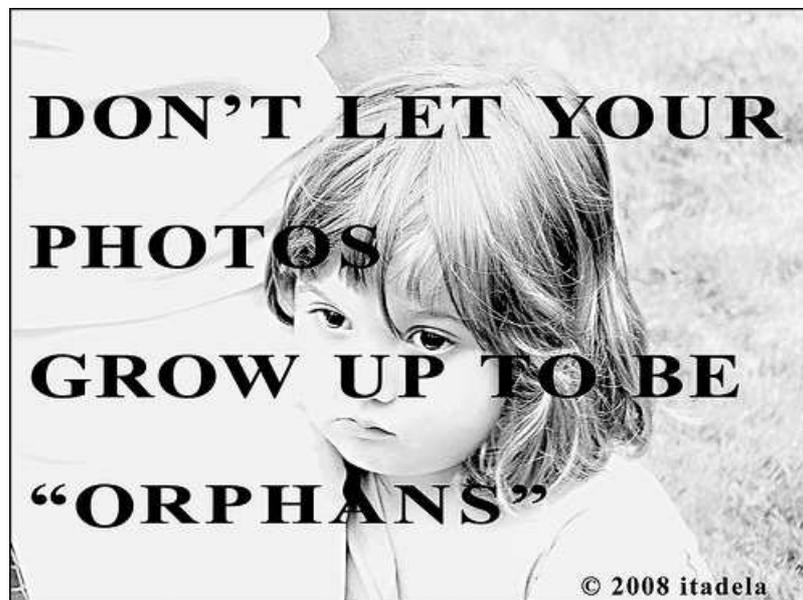
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Supervisor: Helge Sønneland

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1. Abstract

Changes in technologies and global markets are brought about by digital convergence. Europe's answer to the current development is the i2010 program, in which one of the flagship initiatives is the digital libraries. The digitalization of library material has amazing potential to allow people to access material from the comfort of their homes, which until now have been out of reach from general public. However, no work can be digitized and disposed without having the rights cleared, therefore it is important to have a good regulatory framework and clearance process to avoid unnecessary inconvenience to all parties. Today, this framework does not yet exist. That is where the issue about "*Orphan Works*" appears to the public.

The central aim of this thesis is to contribute and propose a solution to the Orphan Works issue currently discussed in the EU and the U.S. I do this by firstly defining the scope of the issue and illustrating the ongoing digitization projects in the different countries. Secondly I outline the current Copyright legislation with a focus on the EU Copyright Directive 2001/29/EC, the Berne Convention, WIPO World Copyright Treaty and WIPO Phonograms and Performances Treaty and European national laws. Finally, I display the approaches adopted by Canada and Japan; solutions discussed in Europe and in the U.S. will be analyzed and a detailed examination of the Nordic Extended Collective Agreement will be given. In the evaluation of the solutions that are under consideration, the Nordic agreement will be considered as being able to provide a solution for both non-commercial and commercial use of Orphan Works. In order to achieve any real progress at European level, I conclude that it is essential that the EU Commission will take necessary measures to harmonize the general requirements for a common European solution, otherwise the least common denominator will be that Member States secure that all other national solutions are accepted.

2. Introduction

Imagine you have a great idea of building a huge searchable database which stores and preserves the content of hundreds of years of your national cultural heritage; and while you create all this data, you find out that for almost half of the content you want to insert in your database, you can not find the right-holders and therefore can not store the content. What you have just realized is that half of the works you want to store are *orphaned*, and without asking the right-holders for permission, you are -easily said- not able to do anything more than have a look and read the hardcopy you hold in your hands.

This is in short terms what happened to the EU Digital Libraries Initiative, to digitization projects of many national libraries, to archives and users who wanted to re-use material all over the world.

The Digital Libraries Initiative is a flagship project of the EU Commission's overall strategy to boost the digital economy, the i2010 strategy. The "i2010: Digital Libraries" initiative deals with Europe's cultural heritage and aims at making Europe's diverse cultural and scientific heritage easier and more interesting to use online for work, leisure and/or study. It builds on Europe's rich heritage combining multicultural and multilingual environments with technological advances and new business models. European libraries and archives contain a wealth of material: e.g. books, newspapers, music, films, photographs and maps etc., which represent the richness of Europe's history, cultural and linguistic diversity. Only a small part of European collections has been digitized so far, but the progress is fast.

Digitization presupposes making a copy, which can be problematic in view of Intellectual Property Rights. Permission is required for the digitized material to be distributed, communicated or otherwise made available to the public. Under current EU Law and International Agreements, material resulting from digitization can only be made available online if it is in the public domain or with the explicit consent of the right-holders. Digital libraries aim to offer material still under copyright protection. In some cases right holders cannot be identified, or if they can be identified, they cannot be located. In this

context, the clarification and transparency of the copyright status of works is an essential element in the European Digital Library Initiative. The process of clearing rights may be obstructed if one or more right owners of a work or other protected subject matter remain unidentifiable or untraceable after a reasonable search has been conducted by a person intending to use this work. Being unable to acquire permission from the right owners concerned makes it impossible to legally reutilize the work.¹

Picture you see a child lost in a big supermarket, crying for the parents to find it. The chance of finding them quickly is dependent on how much information the child can give you and if the supermarket administration supports your search for the parents.

The situation when trying to identify the rights-holders of orphan works is similar. Even if the work does contain information about the authors, you still need to find them.

The general understanding of an orphan work is to be a work for which the copyright owner cannot be found. This creates a diabolical problem in a permission culture where one needs the permission to use a work from the rights-owner prior to the use, as we know it. Orphan works no doubt existed before the computer era and before the invention of the Web. Technological advancement and the political desire to increase access to cultural heritage over the net to the public have exacerbated the problem by increasing the demand for preservation and access to these works. These works often seem to most people to be works of little commercial value, but they will have a great historical and often also a great commercial value. Requiring permission from copyright owners who cannot be found threatens loss of our heritage and limits our ability to teach, learn, create and compete in a global market. The problem of orphan works raises serious questions about the proper balance of private interest, public good and the re-use of works, which leads to the cultural diversity in the on- and offline offer of works inherent in copyright law. Where orphan works are not used, the public is denied access to new innovative products derived from a significant part of the country's cultural heritage and older material could simply disappear due to deterioration as it is legally impossible to undertake preservation work.

1 Stefan van Gompel, Audiovisual Archives and the Inability to clear rights in Orphan Works in: IrisPlus Legal Observations of the European Audiovisual Observatory, Issue 2007-4, p. 2.

2.1. Definitions

2.1.1. Orphan Work

The term Orphan Works can be defined in several ways. In general Orphan Works are by definition works in which copyright still subsists.² Obviously, Orphan Works do not occur when the consent of right owners is not required.

- European approach

The European view defines the term Orphan Work without any significant academic discussion as a term used to describe the situation when the owner of a copyrighted work cannot be identified and/or located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.³ It is a work where the copyright owner is either unknown completely or his name is known but the owner cannot be traced. When it is impossible to find the copyright owner, it is impossible to seek permission to undertake any of the acts restricted by copyright in that work.⁴

- U.S. approach

In the U.S. it is discussed whether the term Orphan Work should be defined as a work for which the copyright owner cannot be found, cannot be identified and/or when the copyright owner does not respond. Especially the last question is interesting when diligent efforts to identify and locate the copyright owner yield no response. One position is to say “no response” should be treated as permission granted by the copyright owner and thereby defined as no orphan work. One argument is that if the copyright owner is not sufficiently interested in his work to respond to a request for permission to use the work, then in the interest of the public good permission should be seen as granted.

Against this presumption it is arguable that every copyright owner could choose not to respond or could be unavailable to respond when contacted.

It would appear inadequate to lay the burden of having to be constantly available on the copyright holders. One could therefore argue “no response” should be treated as

2 Joint Report Sector Specific Guidelines on Due Diligence Criteria for Orphan Works, The EU Digital Libraries Initiative, http://www.ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/mou/guidelines.pdf, Last visited 27.07.08.

3 US Copyright Office, Report on Orphan Works, January 2006, <http://www.copyright.gov/orphan/orphan-full-report.pdf>, p. 15. Last visited 24.4.08.

4 Copyright and Orphan Works, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 4. Last visited 24.4.08.

permission denied and define the work as an orphan work.⁵

In many cases there is no way of knowing definitively who owns the copyright. It is often not possible to know for sure whether the presumed copyright owner is indeed the copyright owner. The copyright owner may be in a situation where it is impossible for him to answer to a request, may it be due to personal or other circumstances. Also, these situations should not be addressed by a legislative solution as this could undermine a principle of copyright, namely the exercise of the exclusive rights at any particular time by undertaking any activity falling within the scope of those rights and/or by licensing other people to exercise those rights or doing neither.⁶ Hence it should be agreed to the already mentioned argument that the burden of having to be available can not be laid on the copyright owner as it would be too heavy.

As a result “no response” should be treated as permission denied and define the work as an Orphan Work.

2.1.2. Digital Library

Digital libraries can be defined as organized or managed collections of digital content made available to the public. They can consist of material/works that has been digitized such as digital copies of books and other physical material form libraries and archives such as images, music or video. They can also be based on information originally produced in digital format.⁷

5 Denise Troll Covey, Rights, Registries, and Remedies: An Analysis of Responses to the Copyright Office Notice of Inquiry Regarding Orphan Works, p. 115-116.

6 Copyright and Orphan Works, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 4. Last visited 24.4.08.

7 What is the Digital Libraries Initiative? A quick definition, http://ec.europa.eu/information_society/activities/digital_libraries/what_is_dli/index_en.htm, Last visited 09.06.08.

3. The Issue

The "Orphan Works" problem arises in connection with the re-utilization of pre-existing content. The reasons for why it can be difficult to trace a copyright owner are various, one should hence have a look at the scenarios in which problems may arise:

1. the original copy of the work has no or insufficient information identifying the copyright owner associated with it,
2. the original owner of copyright can no longer be located at the original address and there are no records of any new addresses,
3. copyright ownership has been assigned to a new owner, or even more than once and at some point along the trail there is insufficient information available about either the new owners name and/or location,
4. the copyright owner has died and information about what happened to rights on his death is impossible to find,
5. the copyright owner is a business, which has ceased to exist and it is impossible to find out what happened to the copyright which was one of the business assets,⁸
6. the duration of author's rights was prolonged up to 70 years after the death of the author and for related rights until 50 years after the event which triggers the term running by the Term Directive in 1993.⁹ This leads to -in worst case- a protection of works which were created since 1860.

Looking at the fifth scenario above, it is for example not unusual for a production or record company to have only existed for the making of a single film or a single project, or they might even become insolvent, and it may not always be clear what has happened to rights in that film or end product of the project as a result of the company's disappearance.

Where the Copyright owner cannot be found, the prospective user has no choice but either to reutilize the work and bear the risk of an infringement claim or to abandon his

8 Copyright and Orphan Works, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 5. Last visited 24.4.08.

9 Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, EU Commission, p. 10, http://ec.europa.eu/internal_market/copyright/docs/review/sec-2004-995_en.pdf, Last visited 24.09.08.

intention to use the work.¹⁰ The latter case is clearly not in the public interest, especially because the copyright owner might not object to the use of his work. In theory every type of work can become orphaned. I.e. manuscripts, books, photos, illustrations, songs, old magazine advertisements and out-of-print novels risk to become orphaned.

The urgency of the problem at issue is first and foremost caused by the advent of new media and digital technologies that has fostered a rapidly growing market for secondary uses of existing works. The digital networked technology offers the capability to reuse existing works at a large scale and at relatively small cost. Content that could not be economically re-exploited over analogue distribution channels can now be disseminated over digital distribution channels at modest cost.¹¹

As witnessed by various international projects such as the Million Book Project or the Google Books Library Project, mass digitisation is now becoming a reality. The British Library estimates that over 40 percent of all in-copyright works are Orphan Works.¹² The acute problem of clearing rights for the collections of human creativity is compounded by the fact that such institutions have a remit to give access to their collections, and the expectation is that this should be done via the web.

In the online environment the provision of content has become predominantly international in scope. Copyrighted material from all over the world can easily be accessed across Europe, so where a user wishes to reuse such material, this may pose considerable obstacles where a copyright owner must be traced in a foreign territory to clear the rights.

If one considers the issue of Orphan Works from the perspective of the audiovisual industry one can find a good example for the seriousness. An audio-visual work is a work that invariably has layers of copyright in all the underlying individual items of content like music, screenplay, artistic design and performers' rights in their performances. So an older audiovisual work may be an Orphan Work which cannot be used legally due to the fact that the owners of rights in either the overlying film or broadcast or any one of the items of content cannot be traced.¹³

10 Bernt Hugenholtz et al., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Final Report, IViR November 2006, p. 162, www.ivir.nl, Last visited 24.04.08.

11 *Ibid.*, p. 163.

12 <http://www.bl.uk/ip/pdf/orphanworks.pdf>, Last visited 20.09.08.

13 *Copyright and Orphan Works*, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 5. Last visited 24.4.08.

3.1. Current use

Orphan Works are and can be used in certain circumstances. These can fall under the following headings:

- use that does not conflict with the acts restricted by copyright
- use that falls within the scope of exceptions to exclusive rights.¹⁴

If one makes a documentary and it is desired to use old newsreel clips there is e.g. no alternative to the orphaned newsreel, but there might be a situation when an alternative to the Orphan Work could be used. If a new production plans to use an orphaned work and it becomes impossible to clear the rights it might be possible to replace the desired use of the Orphan Work by similar material where rights can be cleared. One could also for some types of copyrighted work use less than the extent which is seen as a substantial part of the work what would then not require any permission. An issue arising from this is though, that the test of substantiality looks at both qualitative and quantitative criteria and mostly anything that is worth copying is likely to be a substantial part, so very little use is likely to be possible under this criterion.

Some of the uses of Orphan Works may even fall within the scope of one or more of the existing exceptions to exclusive rights in Art. 5 (2)(c) and Art. 5 (3)(n) of the EU Copyright Directive which will be illustrated in part 5 of this paper. However, even collectively these specific exceptions do not permit that much activity to be undertaken with Orphan Works.

Using material with un-cleared rights might face big claims against the users when a right holder eventually emerges, and acting in this way gives rise to the risk of having to pay substantial damages in addition to the license fee that can be agreed if the right holder is found earlier. The potential liability can deter from using Orphan Works for smaller businesses and is one of the most important reasons behind decisions not to use the material in the first place.¹⁵

A situation often described is one where a creator seeks to incorporate an older work into a new work and is willing to seek permission, but is neither able to identify nor locate the copyright owners in order to seek the wanted permission. While in such circumstances the user might be reasonably confident that the risk of an infringement claim against this use is unlikely, under the current system the copyright in the work is still valid and enforceable. The risk cannot be completely eliminated.

¹⁴ *Ibid.*, p. 6.

¹⁵ *Ibid.*, p. 7.

Given the high costs of litigation and the inability of most creators, scholars and small publishers to bear those costs, the result is as already mentioned, that Orphan Works often are not used, even when there is no one who would object to the use.¹⁶

3.2. Why raise and solve this question?

A provision that would permit legal use of Orphan Works would benefit many people in the cultural business as well as librarians and archivists who have the mission to make cultural significant material available to the public.

A failure to address and solving the Orphan Works issue could lead to infringement of exclusive copyrights and moral rights and taking away the control of the work and would lead to underutilization of potentially valuable content or would invite potential users to simply exploit Orphan Works without the consent of the right owners. This could undermine the system of copyright and related rights as such.

The issue is whether Orphan Works are being needlessly removed from public access and their dissemination inhibited. If no one claims the copyright in a work, it appears likely that the public benefit of having access to the work would outweigh whatever copyright interest there might be. The public interest may be harmed when works cannot be made available to the public due to uncertainty over its copyright ownership and status, even when there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use.¹⁷

Additionally, the inability to clear rights raises problems for libraries, archives and researchers, since difficulties of tracing right holders can mean that libraries or archives are unable to use the un-cleared material in its own activities, including ensuring preservation of the material in the archives.¹⁸

When one asks the leading experts on digital archiving what in their opinion is the single most significant obstacle for preservation of the cultural heritage one uniform answer resounds: copyright concerns.¹⁹ A legal solution should address both the public interest in

¹⁶ Notices, Library of Congress, Copyright Office, Orphan Works, 26. January 2005, p. 2-3, retrieved from Westlaw 30.08.08 (70 FR 3739).

¹⁷ *Ibid.*, p. 5.

¹⁸ Copyright and Orphan Works, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 9. Last visited 24.4.08.

¹⁹ Deirdre K. Mulligan, Jason M. Schulz, Neglecting the national memory: how copyright term extensions compromise the development of digital archives, *Journal of Appellate Practice and Process*, Fall 2002,

having works available to the fullest extent, as well as the interests of right holders in having their works exploited in situations where this would otherwise be impossible.²⁰ A solution should be found that provides legal certainty to bona fide users who want to reutilize existing works of authorship, but at the same time protects the legitimate interests of the authors and copyright owners concerned.²¹ The answer is needed, otherwise there is a certain fear that users could be stimulated to use works without authorization and without paying for the use.

Copyright is not a monopoly right and hence in no way prevents independent creation of something very similar to what has been done before. Of course, original creativity is not dependent on use of earlier copyright material and reality shows that copyright owners are very often willing to agree reasonable license terms for use of their protected material.²²

The question is whether unauthorized use of copyrighted works, i.e. without the copyright owner's permission, should be allowed in certain circumstances and if so, what kind of circumstances these might be.

p. 4, retrieved from Westlaw 30.08.09.

20 Bernt Hugenholtz et al., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Final Report, IViR November 2006, p. 178, www.ivir.nl, Last visited: 24.04.08.

21 *Ibid.*

22 *Copyright and Orphan Works*, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkpaper.pdf>, p. 8-9. Last visited 24.4.08.

4. The Digital Libraries Initiative

The i2010 Digital Libraries Initiative aims at making European information resources easier and more interesting to use in an online environment. A main object of the Digital Libraries Initiative is to achieve "The European Digital Library", which will give European citizens direct access from their computer to cultural collections from all Member States.²³ It is built on Europe's rich heritage combining multicultural and multilingual environments with technological advances and new business models.²⁴ It is a flagship project of the Commission's overall strategy to boost the digital economy and has two key areas, namely cultural content and scientific information.²⁵

There will be three main standards followed to realize the potential of digital technologies for widespread and easy access to information:

- Online accessibility
- Digitization of analogue collections
- Preservation and storage.²⁶

There is still not much of the collection of Europe's cultural institutions available in digital format and it is up to the Member States to make the digitization of cultural heritage happen.

For the online accessibility concrete solutions still have to be found like mechanisms to deal with orphan works and out-of-print works, which are a large part of the collections of cultural institutions.

23 Quick guide through the DLI, Europe's cultural and scientific heritage at a click of a mouse, September 2007, http://ec.europa.eu/information_society/activities/digital_libraries/what_is_dli/index_en.htm, Last visited 09.06.08.

24 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, i2010: Digital Libraries, 30.09.2005 COM(2005) 465 final, p. 3. http://ec.europa.eu/information_society/activities/digital_libraries/what_is_dli/index_en.htm, Last visited 09.06.08.

25 Quick guide through the DLI, Europe's cultural and scientific heritage at a click of a mouse, September 2007, http://ec.europa.eu/information_society/activities/digital_libraries/what_is_dli/index_en.htm, Last visited 09.06.08.

26 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, i2010: Digital Libraries, 30.09.2005 COM(2005) 465 final, p. 3. http://ec.europa.eu/information_society/activities/digital_libraries/what_is_dli/index_en.htm, Last visited 09.06.08.

4.1. Current digitization projects

4.1.1. Digitization of the German National Library (Deutsche Nationalbibliothek, DNB)

The German national library (DNB) has the task to cooperate with national and international archives and libraries and to participate with in this field specialized organizations. In this context the DNB is an active partner in several bodies and projects. The government gave the DNB the duty to collect German cultural heritage through § 2 of the German national library Act. In 1995 the DNB joined the Arbeitsgemeinschaft Sammlung Deutscher Drucke, a working group for the collection of German cultural heritage.

- Arbeitsgemeinschaft Sammlung Deutscher Drucke (AG SDD)²⁷

To coordinate the collection of the missing German national cultural heritage, the responsible libraries established the syndicate of a working group (AG SDD). The working group actively participates in the transition of the printed German national heritage into the digital world.

The Distributed Digital Research Library (Verteilte Digitale Forschungsbibliothek) has several digitization projects sponsored by the German Research Foundation (Deutsche Forschungsgemeinschaft (DFG)). The project participants try to guarantee the presence of the printed cultural heritage in the international network and, at the same time, to contribute to the protection of the original in the sense of collection preservation.

4.1.2. Conference of the European National Libraries (Europeana)²⁸

The Conference of the European National Libraries (CENL) is a foundation with the aim of increasing and reinforcing the role of national libraries in Europe, in particular in respect of their responsibilities for maintaining the national cultural heritage and ensuring the accessibility of knowledge in that field. One of the objectives is to build the European Digital Library²⁹, which was completed in February 2008 where after it became Europeana³⁰, which constitutes the European digital library, museum and archive. Europeana is supposed to provide access to Europe's cultural and scientific heritage

27 <http://www.ag-sdd.de>, Last visited: 10.09.08.

28 <http://www.cenl.org>, Last visited: 10.09.08.

29 <http://www.edlproject.eu>, Last visited: 10.09.08.

30 <http://www.europeana.eu>, Last visited: 10.09.08.

through a cross-domain portal, to stimulate initiatives to bring together existing digital content and to support the digitization of Europe's cultural and scientific heritage.

4.1.3. British Broadcasting Corporation Creative Archive

The British Broadcasting Corporation, BBC, is a public service broadcaster in the UK, run by the BBC Trust.³¹ The BBC is constitutionally established by a royal charter. It is per its charter supposed to be free from both political and commercial influence and answer only to its viewers and listeners.³²

The BBC has invested much time and effort to find new ways to clear the copyright on TV and Radio output in order to allow the British public to have access to all the creative material previously being held in the archives and to get creative with it. Since 2005 BBC clips, news reports and different series from its archive were released under the Creative Archive License. In an 18 month pilot the release of content under the Creative Archive License has been tested during which a huge variety of material has been released.³³

There are some main rules that the user needs to agree to in order to be able to use the Creative Archive material. One rule is that creations, which use the available content, must be only for non-commercial use. Another rule is that derivative works must be shared under the terms of the Creative Archive License.³⁴

4.1.4. German Public Broadcasting

ARD is the first public channel in Germany (Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland) to which the regional broadcasting organizations contribute programs for common distribution according to specified percentages.³⁵ The second public channel, ZDF (Zweites Deutsches Fernsehen), was established in 1961 by a treaty between all West German Länder and transmits national television services.³⁶ ARD and ZDF are regulated by inner-state treaties³⁷ and the fundamental rules concerning nationally distributed public and private television

31 <http://www.bbc.co.uk>, Last visited 20.09.08.

32 <http://www.bbc.co.uk/info/policies/charter>, Last visited, 20.09.08.

33 http://creativearchive.bbc.co.uk/archives/the_bbc_plans, Last visited 20.09.08

34 http://creativearchive.bbc.co.uk/archives/2005/03/the_rules_in_br.html, Last visited 20.09.08

35 Irini Katsirea, *Public Broadcasting and European Law, A comparative Examination of Public Service, Obligations in six Member States*, Wolters Kluwer Law & Business, Alphen an den Rijn 2008, p. 36.

36 *Ibid.*

37 ARD Staatsvertrag of 31 August 1991, last modified by the 9th Rundfunkänderungsstaatsvertrag of 1 March 2007 and ZDF Staatsvertrag of 31 August 1991, last modified by the 9th Rundfunkänderungsstaatsvertrag of 1 March 2007.

programs are included in the Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag). Media Gateways shall, and do to a certain extent already, give users the possibility to access programs and content for video as well as audio broadcasts via the Internet. The technical formats that are being used to achieve this goal are on-demand streaming, near-on-demand streaming, download or podcast. It is in the interest of ARD and ZDF to allow for private use and storage of the content and make certain content of their archives accessible for the users.³⁸ An exception in the German Copyright Law (i.e. § 50 and § 52 of the German Copyright Act) makes this possible.

4.1.5. Norwegian Public Broadcasting archives

The Norwegian broadcasting (Norsk Rikskringkasting, NRK) has started to digitize its archive. In the Norwegian department for church and cultural affairs announcement it is stated that already 2/3 of NRK's radio programs have been digitized.³⁹ The digitization of the archived TV-material is planned, but has not started until now. It might take up to 10-15 years and will cost app. 200 Mio Norwegian kroner (ca. 25 Mio Euro) to digitize the audiovisual program material. The negotiations for the clearing of rights in audiovisual material are held between NORWACO, the collecting society for audiovisual productions in Norway, and NRK.⁴⁰ The issue in these negotiations is, as it is so often, the remuneration of the right-owners. The Norwegian parliament considers it as a superior ambition to make material accessible, further emphasizing that it is a general duty of the Norwegian broadcasting to digitize TV- & radio material. The digitization of the archives is therefore given highest priority. The answer to the question who are to bear the costs remains unanswered.⁴¹

4.1.6. The Google Book Project

The Google Book Search was launched in 2005 with the aim to make the content of books searchable on the Internet.⁴² Google plans and has already in large scale started to scan all books and provide a search index of the books that will be digitized allowing the users to search through the database for the bibliographic information as well as a few text snippets around the search term entered. The search results will depend on the

38 http://www.mediadesk.de/Download/ARD_in_der_digitalen_Welt, p. 17, Last visited: 22.09.08.

39 <http://www.regjeringen.no/nb/dep/kkd/dok/regpubl/stmeld/2006-2007/Stmeld-nr-30-2006-2007-7/9.html?id=466386#>, Last visited 18.09.08.

40 http://www.skuespillerforbund.no/php/index.php?module=article&view=699&page_num=2

41 <http://www.regjeringen.no/nb/dep/kkd/dok/regpubl/stmeld/2006-2007/Stmeld-nr-30-2006-2007-7/9.html?id=466386#>, Last visited 18.09.08.

42 <http://books.google.com>, Last visited 18.09.08.

copyright status of the book. This means that works in the public domain will be entirely accessible whereas for works under copyright protection only a few text snippets around the search term and the bibliographic information will be displayed, unless the publisher has given Google permission to display more text.⁴³ If a search term appears many times in a particular book, Google will display no more than three snippets preventing the user from viewing too much of the book for free.⁴⁴ Furthermore, Google will not display snippets for certain reference books, such as dictionaries, for there is likelihood that the market for the work could be harmed so in such exceptional cases, only the bibliographic information will be displayed.⁴⁵ To provide further protection to the copyright holders, Google also disables the user's print, save, cut and copy functions on the text display pages so that the user is limited to reading the information on the screen.⁴⁶ Google is currently scanning all books from libraries of Harvard, Stanford, Oxford, Michigan University and the New York library and digitizing them except for those books subject to the opt out policy.⁴⁷ In addition Google has concluded agreements with European libraries which cover digitisation of public domain works.⁴⁸

- Opt-in and Opt-out policy

The difference between an opt-in policy and opt-out policy is that whereas in the former, the burden is on the company to seek permission from the copyright owner as to whether to make available the digitized copy of the work, the latter on the other hand presupposes that the company will scan the work unless the author refuses permission. The burden is then on the owner of copyright to expressly opt-out.⁴⁹ One could state that Google's opt-out procedure shifts the responsibility for preventing infringement to the copyright owner rather than the user, turning every principle of copyright around.⁵⁰ Under Copyright law, the user can copy only if the owner affirmatively grants permission to the user, so

43 Cameron Westin, Is Kelly shifting under Google's feet? *Duke Law & Technology Review*, Rev. 2, p. 2, retrieved from Westlaw 30.08.09.

44 Band, Jonathan, The Google Library Project: Both Sides of the Story, <http://www.plagiary.org/Google-Library-Project.pdf>, Last visited 08.09.08, p.1.

45 Prasad, Akhil & Agarwala, Aditi, Copyright, Google and the digitization of libraries, *Computer Law & Security Report* 24 (2008), p. 256.

46 Hanratty, Elisabeth, Google Library: Beyond fair use?, *Duke Law & Technology Review* 2005 (10), p.1, retrieved from Westlaw 30.08.08.

47 Kuchinskas, Susan, Google Library: Peril for Publishers? <http://www.internetnews.com/business/article.php/3513586>, last visited 29.08.08.

48 Green Paper, Copyright in the Knowledge Economy, Commission of the European Communities, <http://www.euo.dk/upload/application/pdf/53dc61e3/20080466.pdf>, p. 8, Last visited 06.08.08.

49 Prasad, Akhil & Agarwala, Aditi, Copyright, Google and the digitization of libraries, *Computer Law & Security Report* 24 (2008), p. 256.

50 Association of American Publishers Press Release, Google Library Project Raises Serious Questions for Publishers and Authors, 12.08.05.

copyright is typically an opt-in system.

- Legal classification

The Library Project involves two actions that raise copyright questions. First, Google copies the full text of books into its search database. Second, in response to user queries, Google presents users with a few sentences from the stored text. The amount of the expression presented to the user is de minimus, so the latter action probably would not lead to liability. Therefore the focus is on the first issue, the copying of the full text of books into its search database.⁵¹ Google is scanning and digitizing the books without the permission of the copyright holders or their licensees, though still it can be chosen to restrain Google by electing for the opt-out policy.

For the works which are in the public domain and which no longer enjoy copyright protection Google is both morally and legally justified to scan and digitize the books.⁵²

In making the digital copy, Google could be infringing on the reproduction right of the copyright holder and continues that infringement when it allows a portion of a copyrighted work to be displayed on a user's computer screen without permission from that copyright holder.⁵³ It must be stressed, that activities of private entities, such as Google as a search engine, cannot benefit from the exception contained in Art 5 (2)(c) and only covers acts, which are not for direct or indirect economic or commercial advantage.⁵⁴ Google's action is without a question a violation of EU Copyright law. Google justifies their actions by relying on the fair use doctrine, which is a defence in the U.S. but not in the EU, with exception of the UK. Furthermore it is unclear if the fair-use doctrine is enforceable in the U.S. as Google argues, unfortunately this is not an issue to be discussed in more detail this paper.

Google's primary goal as a "for-profit" organization is to generate revenue from the advertising space it sells on the web page, so it is acting with a commercial interest and the intention with this service is clearly to make money.

51 Band, Jonathan, The Google Library Project: Both Sides of the Story, <http://www.plagiary.org/Google-Library-Project.pdf>, Last visited 08.09.08, p.3.

52 Prasad, Akhil & Agarwala, Aditi, Copyright, Google and the digitization of libraries, Computer Law & Security Report 24 (2008), p. 256.

53 Hanratty, Elisabeth, Google Library: Beyond fair use?, Duke Law & Technology Review 2005 (10), p. 2, retrieved from Westlaw 30.08.08.

54 Green Paper, Copyright in the Knowledge Economy, Commission of the European Communities, <http://www.euo.dk/upload/application/pdf/53dc61e3/20080466.pdf>, p. 8, Last visited 06.08.08.

5. International Legislation

5.1. Legal fundamentals

The copyright legislation in Europe as well as in the rest of the world is not only affected but also developed by international treaties as the Berne Convention, TRIPS Agreement, WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty and the Rome Convention. This influence will be explored in detail under this section.

5.2. EU Copyright Legislation and international obligations

The Copyright Directive has harmonised the right of reproduction, the right of communication to the public, the right of making available to the public and the distribution right. The basic principle underlying the harmonisation effort was to provide the right-holders with a high level of protection; hence the scope of exclusive rights was very broadly defined.⁵⁵ The Directive introduced an exhaustive list of exceptions to copyright protection, although there was no international obligation to do so. Art 5 of the Copyright Directive does include a provision that limits those areas for which exceptions can be provided. The Member States should be limited in their ability to introduce new exceptions or extend the scope of the existing ones beyond what is allowed under the Directive.⁵⁶

Art 5 (5) of the Directive provides that the exceptions and limitations permitted by the Directive are to be applied in certain special cases, which do not conflict with the normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right-holder. This provision is also known as the Three-Step-Test.⁵⁷ The formulation of Art 5 (5) reflects the Community's international obligations in the area of copyright and related rights. In similar terms one finds this test in Art 9 (2) of the Berne Convention for reproduction purposes and more generalized in Art 13 of the TRIPS Agreement and Art 10 of the WCT.

Considering limitation on remedies this cannot be seen as consistent with the

⁵⁵ *Ibid.*, p. 4.

⁵⁶ *Ibid.*, p. 4-5.

⁵⁷ *Ibid.*, p. 5.

requirements of the Directive on enforcement of intellectual property rights⁵⁸ since this Directive includes even more specific and detailed provision on remedies for infringement than the TRIPS Agreement.⁵⁹

When it comes to exceptions of rights there is no harmonization of exceptions across the EU except in few special cases. There is no provision obvious that would permit a general exception for use of orphan works.

Copyright law is territorial; this means only the copyright laws of a particular country apply with respect to acts of infringement that occurred in that country. Copyright subsists the moment an original work of authorship is fixed in a tangible form, it need not be registered with a Copyright Office or published with notice to obtain protection. The Berne Convention and other treaties dealing with copyright that have followed forbid the imposition of formalities as a condition to copyright, principally on the grounds that failure to comply with formalities can serve as a trap for the unwary, resulting in the inadvertent loss of copyright.⁶⁰ The aim of copyright is e.g. to protect copyright owners. This protection should not depend on whether the copyright owner is locatable, available or responsive.

Ownership is often referred to as an abstract bundle of rights, known collectively as "the copyright" which gives the author the exclusive rights to reproduce/copy, adapt, distribute, perform publicly, display publicly/broadcast and other uses of the copyrighted work.⁶¹ Copyright means in general the right granted for the protection of literary, dramatic, musical and artistic works, and other works resulting from the authors own intellectual creation.⁶² The Copyright system grants rights of an economic nature, covering all uses described above. Each of the rights covered by copyright can be separately assigned or licensed.⁶³ It denotes a property right against all other conflicting rights and interests and is superior to all non-rights. Having copyright is to have an exclusive title which confers on its owner the right to use, to exclude others both from use and possession and to transmit use and possession to others. A private individual has

58 Directive 2004/48/EC on the enforcement of intellectual property right.

59 Copyright and Orphan Works, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 18. Last visited 24.4.08.

60 See Art 5 (2) Berne Convention.

61 Dane S. Ciolino, Why Copyrights are not Community Property, *Louisiana Law Review*, Fall 1999, retrieved from Westlaw, 12.08.09, p. 127, 133.

62 J. A. L. Sterling, *World Copyright Law*, London, Sweet & Maxwell 2003, p. 4.

63 *Ibid.*, p. 15.

the right to determine what will be done with an object.⁶⁴ Copyright laws are considered a means to prevent trespassers as copiers and free-riders from violating the rights authors have in their protected works.⁶⁵ Copyrights are a powerful economic tool; they are a connection between rights and rewards.

In addition to economic rights, copyright also provides another set of rights, namely the moral rights. Moral rights seek to protect the integrity of a work and the author's connection with it.⁶⁶ Economical rights include, as above mentioned, the rights to reproduction, make derivative works, public distribution, performances and display and the right to broadcast the work.⁶⁷ The right in the context of property is directed against the entire world, it is known as right in rem as opposed to right in personam which is directed against a single person. Intellectual property is concerned with giving only the rights-owner the right to specific uses of the work, and requiring permission from the rights-owner if other wants to make use of the work.

Generally, different acts restricted by copyright or related rights are concerned when reutilizing existing content. Although libraries and archives may be authorized by law to digitize a work, the communication to the public including making it available by way of interactive on-demand transmissions remains covered by an exclusive right.⁶⁸ The public is offered access to the works from a place and a time individually chosen by them when it comes to those interactive on-demand transmissions. This is why permission from the rights-holders is required if digitized material is to be subsequently distributed, communicated or otherwise made available to the public.

When the terms of protection have expired, a copyrighted work becomes part of the public domain. From that time every member of the public and the creator share the same privilege of use.⁶⁹ According to Art. 1 of the Copyright Directive the economic and moral rights protection in a copyrighted work lasts 70 years from the end of the calendar year in which the author dies. In the U.S. all works-for-hire and works created by corporate authors are protected for ninety-five years. As a result, many, if not even almost

64 Lior Zemer, *The Idea of Authorship in Copyright*, Ashgate, Aldershot 2007, p. 44.

65 *Ibid.*, p. 45.

66 David Vaver, *Moral Rights Yesterday, Today and Tomorrow*, *International Journal of Law and Information Technology* 7(3) 1999, p. 270.

67 Lior Zemer, *The Idea of Authorship in Copyright*, Ashgate, Aldershot 2007, p. 51.

68 Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works, i2010: Digital Libraries High Level Expert Group- Copyright Subgroup, p. 18, http://ec.europa.eu/information_society/activities/digital_libraries/hleg/hleg_meetings/index_en.htm, Last visited: 09.06.08.

69 Lior Zemer, *The Idea of Authorship in Copyright*, Ashgate, Aldershot 2007, p. 62-63.

all works, created after 1923 are protected by copyright until 2018.⁷⁰ Also the EU Commission has already adopted an initiative in which the term of protection for recorded performances and the record itself (the term of copyright for performers) is proposed to be extended from 50 up to 95 years.⁷¹

- Publication

The general understanding of “to publish” is to make content available to the public. “Public” means, as opposed to “private”, pertaining to the people or to the community.

Art. 3 (3) of the Berne Convention defines the expression “published works” meaning works published with the consent of the authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies have been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work.

- Reproduction

In the context of Copyright, reproduction refers to copying, not to performance or some other act which brings a work to perception otherwise than in a tangible copy. The meanings of reproduction, among others, are the action of repeating in a copy, a representation in some form or by some means of the essential features of a thing and the action of bringing into existence again. So, reproduction can refer to the action of making a copy, the copy itself and use of the copy to render the original perceptible.⁷² A copy does not need to be in the same medium as the original, as long as it is fixed and communicable to others. The fact that the copy is digital rather than in the form of i.e. a paper book is also irrelevant.⁷³

- Exceptions for libraries and archives for reproduction from copyright

As mentioned in part 2.1. of this paper, the Copyright Directive 2001/29/EC allows an exception for specific acts of reproduction for non-commercial purposes by publicly accessible libraries, educational establishments, museums or archives in Art. 5 (2)(c).⁷⁴ This exception is however not mandatory and has led to different implementations in the Member States. Also, as recital 40 of the Copyright Directive points out, this exception

70 Pamela Brannon, Reforming Copyright to foster innovation: Providing access to orphaned works, *Journal of Intellectual Property Law*, Fall 2006, p. 4, retrieved from Westlaw 30.08.08.

71 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1156>, Last visited 22.09.08; http://ec.europa.eu/internal_market/smn/smn51/docs/copyright_en.pdf, Last visited 22.09.08.

72 J. A. L. Sterling, *World Copyright Law*, London, Sweet & Maxwell 2003, p. 179.

73 Elisabeth Hanratty, Google Library: Beyond fair use?, *Duke Law & Technology Review* 2005 (10), p. 2, retrieved from Westlaw 30.08.08.

74 Stefan van Gompel, Audiovisual Archives and the Inability to clear rights in Orphan Works in: *IrisPlus Legal Observations of the European Audiovisual Observatory*, Issue 2007-4, p. 2.

should be limited to certain special cases and not cover uses made in the context of online deliveries of protected works or phonograms. This could mean that reproductions are only allowed in certain specific cases which would cover certain acts necessary for the preservation of works contained in the libraries catalogues, though it does not provide libraries or other beneficiaries with a blanket exception from the right of reproduction.⁷⁵

Another exception publicly accessible libraries, educational establishments, archives and museums benefit from under current copyright legislation is Art. 5 (3)(n) of the Copyright Directive. This is a narrowly formulated exception to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments.⁷⁶

Works are broadly classified as works in public domain and works not in public domain and thus enjoying copyright protection. Works in public domain no longer enjoy the legal monopoly as such time has elapsed within which the creator of the work had to be rewarded and such time has commenced where the larger goal which copyright seeks to serve i.e. to promote the progress of science and arts.⁷⁷

5.2.1. German Legislation

The German Copyright Act does not contain any provision that deals with the Orphan Works issue. For libraries the German Copyright Act provides two articles, § 19a and §95a Gesetz über Urheberrecht und verwandte Schutzrechte (UrhG), which are of importance.

§ 19a contains the right to make a work publicly available. The author of a work is the only one who can make use of this right, if there are no exclusive licenses/agreements who give other people the right do so. For libraries this means that they are not allowed to make a work publicly available unless they have obtained the right to do so by the copyright owner. The only exemption to this right is given in § 52a which only allows a public availability for parts of a work for research or educational purposes and only for a limited group of people.

§ 95a contains the right for the rights-owner to digital protection/safety measures like

⁷⁵ Green Paper, Copyright in the Knowledge Economy, Commission of the European Communities, <http://www.euo.dk/upload/application/pdf/53dc61e3/20080466.pdf>, p. 8 Last visited 06.08.08.

⁷⁶ *Ibid.*, p. 7.

⁷⁷ Akhil Prasad & Aditi Agarwala, Copyright, Google and the digitization of libraries, Computer Law & Security Report 24 (2008), p. 256.

Digital Rights Management or other forms of security measures. It is against the law to circumvent such a measurement. From § 95b one can read that only i.e. libraries with archive functions or researchers who need the work for research purposes are allowed to ask for instruments to circumvent these security instruments.

Another provision is § 41 which deals with works who are no more used in a commercial sense. A rights-owner gets the right to exploit his work back if the exclusive license in which he gave away the exploitation right of the work has not been used within a special timeframe defined in § 41. In the same sense it is nowadays argued, that if the copyright-owner cannot be found, it should be allowed to “re-publish” the Orphaned Work. Therefore, in the view of the existing § 41, a new § 52c is proposed by several academics in Germany to regulate the Orphan Works issue.⁷⁸

5.2.2. Nordic Legislation

- „Avtalelisenser“ – Extended Collective Agreement Licenses

A very Nordic arrangement is the legal instrument of an Extended Collective Agreement License (in the following “collective license”) by law, which not only exists in Norway, but also in Denmark, Sweden, Finland and Iceland. In the Nordic countries a copyright organization can represent only those right owners who have in person or through another organization given a mandate to act on their behalf.⁷⁹

The effects of an agreement concluded between an organization and a user cover only the contracting parties and any agreement is not binding on third parties. In the extended license system an agreement obtains, directly on the basis of law, a binding effect on non-represented right-owners.

An extended license can be seen as a limitation on copyright, which interferes as little as possible with the freedom to contract and aims at maximizing the effective administering of rights. The extension effect provides the user a necessary protection against claims by outsiders and against criminal sanctions.⁸⁰

The collective license comprises an agreement between a representative collecting rights organization and a user or an organization of users for the utilization of copyrighted

78 <http://www.urheberrechtsbuendnis.de/docs/verwaisteWerke.pdf>, Last visited 10.07.08; <http://www.inf-wiss.uni-konstanz.de/People/RK/Vortraege2008/VerwaisteWerkePr%E4sentation.ppt>, Last visited: 10.07.08.

79 http://www.kopinor.org/opphavsrett/avtalelisens/extended_collective_license, Last visited 20.09.08.

80 *ibid.*

material. This agreement releases a right for the users encompassed by the agreement to also use works/material from right-owners that are not part of the collecting rights organization.

Background for this system is a view on the users when the coordination/organization of placing several individual agreements with a huge amount of copyright owners is not feasible or defensible, both administrative and economic.⁸¹

An extended license system contains in general the following six elements:⁸²

1. The organization and the user conclude an agreement on the basis of free negotiations.
2. The organization has to be nationally representative in its field.
3. The agreement is by law made binding on non-represented right owners.
4. The user may legally use all materials without needing to meet individually claims by outsiders and criminal sanctions.
5. Non-represented right owners have a right to individual remuneration.
6. Non-represented right owners have in most cases a right to prohibit the use of their works.

A professional organization as a negotiating party is stronger than an individual right owner. Its sole task is to aim at results as advantageous as possible. The contractual terms and conditions thus achieved are in general acceptable also to outsiders. A non-represented right owner would hardly be able to achieve better results by acting alone.⁸³

It is important to see the different connection between the agreement and the collective license by law. The agreement between the collecting rights organization and the user implicates acceptance from the right-owner to the use of his work and the proxy for administration of his rights. In contrast, the collective license contains by law the right to use works from right-owners that are not encompassed by the agreement. This arrangement made it possible to clear rights effectively without having an “a priori” consent.

81 Free translation of: ”Avtalelisens”, <http://www.clara.no/definisjoner/index.html?term=18468882>, Last visited 20.08.2008.

82 http://www.kopinor.org/opphavsrett/avtalelisens/extended_collective_license, Last visited 20.09.08.

83 *ibid.*

5.2.3. Legislation of the United Kingdom

The United Kingdom has a provision that affects a small subset of orphan works, namely those for which it is reasonable to assume the copyright has already expired. The law provides that there is no infringement where the copyright owner cannot be found by a reasonable inquiry and where the date the copyright expires is uncertain but it is reasonable to assume that the copyright has expired.⁸⁴

The British Screen Advisory Council preferred that another exception that would permit the use of orphan works would be coupled with the possibility for copyright owners who later emerge of seeking compensation for the use would be implemented in Copyright Law.⁸⁵ A problem would then be, whether such an exception would be compatible with the UK's obligation under EU Copyright Law. However, the UK Government is asked "*to ensure that the need to provide comprehensive solutions to the issue of Orphan Works is solved across the EU as part of the current review of that Directive*".⁸⁶ From this one could read, that the BSAC is asking the UK Government to recommend to the Commission to implement another exception, possibly under Art 5 (3) (a) of the Copyright Directive, to solve the Orphan Works issue.

5.2.4. North American Legislation, United States of America and Canada

- U.S.

Under the Copyright Act of 1909 a registration of the work was needed to obtain copyright protection in the U.S. until 1978. This was changed through the Copyright Act of 1976, which came into force 1st of January 1978 and made it no longer necessary to register a work for copyright protection.

The U.S. Copyright Act provides libraries and archives an explicit exemption from liability for copyright infringement under certain, designated circumstances. To be non-infringing it must:⁸⁷

1. be a single copy
2. made by a library or archive or by employees of such acting within the scope of their employment

⁸⁴ Notices, Library of Congress, Copyright Office, Orphan Works, 26. January 2005, p. 6, retrieved from Westlaw 30.08.08 (70 FR 3739).

⁸⁵ Copyright and Orphan Works, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 19. Last visited 24.4.08.

⁸⁶ *Ibid.*, p. 20.

⁸⁷ Elisabeth Hanratty, Google Library: Beyond fair use?, Duke Law & Technology Review 2005 (10), p. 3, retrieved from Westlaw 30.08.08.

3. not be associated with any commercial purpose
4. be copied from a collection that is open to the public or at least all researchers
5. include a notice of copyright.

The Copyright Act was updated in 1998 to reflect the innovations on digital technology and the Senate clarified that digital libraries and archives that exist only in the virtual sense on the Internet do not fall under the library exemption.⁸⁸

Fair Use is an affirmative defence to what would otherwise be an infringing act, such as reproducing a copyrighted work. This attempts to balance the inherent tension in the purpose and implementation of copyright law. Fair use allows others than the owner of the copyright to use copyrighted work without permission when reasonable to promote science and the useful arts. When trying to distinguish what is reasonable fair use from what is actionable infringement one has to apply four non-exclusive weighing factors which are according to Sec. 107 of the U.S. Copyright Law.⁸⁹

1. The purpose and character of the use

This part of the analysis should take into consideration whether the use was of a commercial nature or is for non-profit educational purposes. Commercial purposes weighs against fair use but the crux is not whether the motive of the use is only commercial but whether the use allows the user to profit from exploitation of the copyrighted material without paying the customary price for it.⁹⁰

2. The nature of the copyrighted work

The more creative the expression embodied in a work, the more likely a copy will not be fair use. This means that copying factual works including factual elements of creative works is more likely to be fair use. Also, if the work is unpublished it is less likely to be subject to fair use.⁹¹

3. The amount and substantiality of the portion used

This is about the amount and substantiality of the portion of the copyrighted work used in relation to the entirety of the copyrighted work and the purpose of the copy. If the copy substantively captures the essence of the work the copying might preclude fair use. Usually when a user reproduces an entire work and uses it for its original

⁸⁸ *Ibid.*

⁸⁹ <http://www.copyright.gov/title17/92chap1.html#107>, Last visited: 14.09.08.

⁹⁰ Elisabeth Hanratty, Google Library: Beyond fair use?, *Duke Law & Technology Review* 2005 (10), p. 4-5, retrieved from Westlaw 30.08.08.

⁹¹ *Ibid.*, p. 6.

purpose, with no added benefit to the public, the doctrine of fair use is inapplicable.⁹²

4. The effect of the use on the potential market

This relates to the effect that the potentially infringing use has on the prospective market for, or value of, the copyrighted work. It is the currently existent markets that are considered as well as any potential markets for the original or derivative works that a creator might develop or license others to develop. A use that substitutes for the original is not fair use because it harms the market for the original, since users turn to the substitute instead of the original.⁹³

- International Conventions/Treaties and the U.S. Legislation

The U.S. Copyright Office clearly sees, that development of any omnibus orphan works provision must keep in mind the U.S. international law obligations that relate to copyright. Those obligations are found primarily in the major multilateral treaties dealing with copyright: the Berne Convention, the TRIPS Agreement, the WCT and the WPPT.⁹⁴ In addition to the ban on formalities imposed by the international copyright system, the U.S. Copyright Office sees that the other major obligation of that system relates to the scope of limitations and exceptions to copyright a country can enact and refers to the different limitations and exceptions provided under the Berne Convention for substantive rights.

- Canadian Legislation

For Copyright Owners who cannot be located, section 77 of the Canadian Copyright Act covers circumstances in which license may be issued by the Copyright Board to do an act as mentioned in section 3, 15, 18 or 21 of the Copyright Act. These sections provide the rights-owner with the economical and moral rights. A person who wishes to obtain a license to use a published work, a fixation of a performer's performance, a published sound recording or a fixation of a communication signal in which copyright subsists can apply to the board for the issuance of the license. The license issued under section 77 (1) is non-exclusive and subject to the terms and conditions the Board may establish. The copyright-owner may no later than five years after the expiration of a licence issued under section 77 (1) collect the royalties fixed in the license or commence an action to

⁹² *Ibid.*

⁹³ *Ibid.*, p. 7.

⁹⁴ US Copyright Office, Report on Orphan Works, January 2006, <http://www.copyright.gov/orphan/orphan-full-report.pdf>, p. 59. Last visited 24.4.08.

recover them in a court of competent jurisdiction.⁹⁵

⁹⁵ For the sections 3, 15, 18, 21 and 77 of the Canadian Copyright Act, see: <http://www.cb-cda.gc.ca/info/act-e.html#rid-33751>, Last visited 20.09.08.

6. Solutions

Before trying to find a solution to the issue, one should have a look at the governing principles for the concerned groups.

For the group of rights holders the governing principles can be seen as⁹⁶

- the respect for copyright and related rights
- digitization and use within the premises of libraries taking place only with right holders consent or based on statutory exception
- online availability taking place with right holders consent
- right holders consent meaning rights clearance based on individual or collective licensing or combination thereof.

For the group of libraries, archives and museums the governing principle can be seen as⁹⁷

- legal certainty in their activities
- access within the premises of libraries, archives and museums or online availability
- getting permission for access to born-digital works or works digitized by rights holders
- getting permission for large scale digitization and access to analogue works
- legal certainty through solution for orphan works issue.

Taking into account these principles it shall be the goal to find a balanced solution that serves both groups.

6.1. Solution in Canada

As mentioned in part 5.2.4 the Canadian Copyright Act in section 77 permits a person who wishes to obtain a license to use a published work, a fixation of a performer's performance, a published sound recording or a fixation of a communication signal to apply for a license after reasonable efforts to locate the owner. So the understanding of this provision is that the Copyright Board must be satisfied that the applicant has made reasonable efforts to locate the copyright owner, but it still has not been possible to locate

⁹⁶ See further: Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works, i2010: Digital Libraries High Level Expert Group- Copyright Subgroup, p. 6, http://ec.europa.eu/information_society/activities/digital_libraries/hleg/hleg_meetings/index_en.htm, Last visited: 09.06.08.

⁹⁷ *Ibid.*, p. 66.

the copyright owner. The Board can then issue a non-exclusive license authorizing the person to use it in a way they wish. The license will say what use is permitted, the expiry date, license fee and other terms and conditions the Board considers appropriate. The license fee is usually required to be paid to a copyright collective society which would normally represent the un-locatable copyright owner. The society is then liable to reimburse with the license fee anyone who establishes ownership of copyright within five years of the expiry of the license.

The effect of this license seems to appear to be of the nature of an exception coupled with remuneration, or as a compulsory license.⁹⁸

Since 1990 until today only 226 licenses have been granted through the Copyright Board.⁹⁹ It seems as if one reason might be the inability of the Board to grant licenses other than for uses in Canada, what of course would be a problem with any provision in any country since the nature of copyright laws is national. The Canadian provision is not applicable to unpublished works, section 77 does not allow any use of these works in Canada. This can be seen in the fact that out of seven applications for licenses three were denied because the work was unpublished.¹⁰⁰ The Canadian provision therefore lacks to solve the issue for unpublished works.

6.2. Solution in Japan

For works where the copyright owner is unlocatable Japan has implemented a compulsory licensing system. Unlike the Canadian system, the Japanese system provides for arbitration when the user who wishes to broadcast a published work or make and distribute phonograph records of a work is unable to negotiate with the copyright owner. Japanese law also provides for arbitration when the user attempts negotiation but fails to reach an agreement with the copyright owner. In each instance the user must pay a reasonable royalty set by the Commissioner for the use of the work.¹⁰¹

Under a compulsory licensing system, the use is licensed and approved prior to the actual use, resolving any uncertainty on the part of the user. This system assures the user that the use is not infringing upon payment of the statutory fee.

98 Copyright and Orphan Works, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 10. Last visited 24.4.08.

99 <http://www.cb-cda.gc.ca/unlocatable/licences-e.html>, Last visited 16.08.08.

100 <http://www.cb-cda.gc.ca/unlocatable/denied-e.html>, Last visited 16.08.08.

101 Art. 67-70 of the Japanese Copyright Act, http://www.cric.or.jp/cric_e/clj/clj.html, Last visited 10.09.08.

6.3. Possible solutions

The European Commission and the U.S. Copyright Office have different approaches to find a solution to the Orphan Works issue.

Any solution would in general have to comply with national legislation but it also has to comply with international conventions and treaties on one side and with EU legislation on another. But, it should still be seen that a solution could bring a change of legislation about; such a solution must then show how it can be implemented in the law. The use of orphan works needs, as a “best case scenario”, an international solution, as it will often be the case that material that has been made in reliance on an orphan work provision in one country will be traded internationally. This becomes an issue where the rights have not been cleared or there is no exception or other provision to rely upon in other countries. It has though still to be borne in mind that also national solutions with national area of application already can be seen as a step in the right direction.

The best approach, which is searched for in the following, would be to try and reach agreement at international and/or EU level on appropriate solutions.¹⁰²

6.3.1. Solutions discussed in the EU

In February 2006 the European Commission established a High Level Expert Group to advise it on organizational, legal and technical challengers and to contribute to a shared strategic vision for European Digital Libraries. The High Level Expert Group then set up a Copyright Subgroup to deal with the Copyright issues. This Copyright Subgroup has focused on the development of practical solutions for inter alia out-of-print works and orphan works.¹⁰³ The recommendations of the Copyright Subgroup will be discussed in the following paragraph.

The solutions discussed in the EU important for this work are the recommendations and guidelines from the Copyright Subgroup, which aim to provide a common multi lingual access point to Europe’s cultural heritage.

The Final Report of the High Level Expert Group clarifies that clarification and transparency in the copyright status of a work would be an important element in the

102 Copyright and Orphan Works, British Screen Advisory Council, Paper for the Gowers Review, August 2006, <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>, p. 17. Last visited 24.4.08.

103 Joint Report Sector Specific Guidelines on Due Diligence Criteria for Orphan Works, The EU Digital Libraries Initiative, http://www.ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/mou/guidelines.pdf, p.1, Last visited 27.07.08.

European Digital Library initiative. Cultural institutions would need adequate certainty in dealing with orphan works.¹⁰⁴

The general prerequisites that need to be fulfilled when considering the use of orphan works are¹⁰⁵

- A user wishes to make good faith use of a work with an unclear copyright status
- Due diligence has been performed in trying to identify the rightsholders and/or locate them
- The user wishes to use the work in a clearly defined manner
- The user has a duty to seek authority before exploiting the orphan work, unless a specific copyright exception applies.

Following are the guidelines for the diligent search criteria which should be established.

- Diligent Search Guidelines

It is proposed that there needs to be guidance on what constitutes diligent search if this is required before the use of a work. These diligent search guidelines could best be established in collaboration with right holders and cultural institutions. The European Commission invited representatives of several stakeholders to discuss and agree upon due diligence guidelines for four creative sectors on European level. These European level guidelines including generic information resources could be linked to national resources and thereby establish a map of available information resources across Europe.¹⁰⁶ This development of databases on information about orphan works might be able to facilitate users in their search. Interlinking these databases with national databases and registries would achieve a common multilingual access point and a European-wide resource that is needed. The Copyright Subgroup had developed a set of Key Principle for Databases and Rights Clearance Centres for Orphan Works and it appeared as a result of the preliminary work that a test-base would be implemented in a forthcoming project called ARROW.¹⁰⁷

The diligent search principles were set as¹⁰⁸

- cover all orphan works on the basis of a shared definition
- Include guidance on diligent search

104 Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works, i2010: Digital Libraries High Level Expert Group- Copyright Subgroup, p. 11, http://ec.europa.eu/information_society/activities/digital_libraries/hleg/hleg_meetings/index_en.htm, Last visited: 09.06.08.

105 *Ibid.*, p. 12.

106 *Ibid.*, p. 10-11.

107 *Ibid.*

108 *Ibid.*, p. 15.

- Include provision for withdrawal if the right holder reappears
- Offer cultural, non-profit establishments a special treatment when fulfilling their dissemination purposes, to be further discussed between stakeholders
- Include requirement for general remuneration or remuneration of the right-holder reappears.

Also in this context the Copyright Subgroup suggested that the notion and conditions of diligent search in the context of orphan works needed to be elaborated. The parameters were the following:¹⁰⁹

- Any solution for Orphan Works should be applicable to all kinds of protected works
- The potential user of orphan works should be required to conduct a thorough search in good faith in the country of publication/production if applicable, with a view to identifying, locating and contacting the copyright owner, prior to the use of the work
- A flexible approach should be adopted to ensure an adequate solution in dealing with individual circumstances of each Orphan Work, taking into account various categories of works
- Guidelines or best practices specific to different kinds of work could be worked out by stakeholders in different fields
- Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted, due to rapidly changing information sources and search techniques.

Diligent search guidelines on European level would by their nature be generic and it would be important to customise the generic information resources locally and link national resources into a European-wide information pool. This would be particularly important, as the country of origin of the work would normally be the place where the search would be initiated.

Therefore, while due diligence guidelines would be an important feature in facilitating the use of Orphan Works, they would need to be supplemented by practical tools to serve the users.¹¹⁰

- Rights Clearance Procedure and Rights Clearance Centre

A part of the proposal by the copyright subgroup is the development of a rights clearance

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, p. 16.

procedure and a Rights Clearance Centre to grant licenses to use orphan works. As an integral part of the ARROW Project, rights clearance can take place where licenses are offered by a mechanism set up by right holders.

The Commission recommended that the Member States should recognise solutions in other countries that fulfil the diligent search criteria in order to achieve the cross-border effect. Material whose right-holders would be considered diligently searched for in one Member State would also be considered accordingly in another. The solution would be based on the concept of mutual recognition.¹¹¹

The Copyright Subgroup concluded that it is important to offer solutions to orphan works from the beginning, as it acknowledges that various voluntary and regulatory mechanisms to facilitate the use of orphan works exists in different countries and new proposals are pending. Based on this approach the Copyright Subgroup emphasized the need for interoperability.¹¹²

6.3.2. Solution through change of Copyright Law?

A solution could be to give libraries and archives more rights through the Copyright law. The national libraries are in most Member States seen as our cultural archives and could therefore get the right to obtain and make backup copies that are stored in digital escrows. The basic rule could be that libraries have the right to produce new, unprotected copies if the right-owner does not opt-out from this rule.¹¹³

For orphan works the national libraries could get the right to clear the rights of these works. In most Member States there is a law that puts the duty to deliver a depositary or presentation copy of the work to the national libraries on the author and/or publisher, as i.e. § 14 of the German national library Act. Through this law the national libraries should have an overview of works, authors and publishers. If a work is not registered in the national library, it is arguable that the rights-owner is not interested in using his right and it could seem adequate that the work is made publicly available.

The problem with this solution though is, that the depositary rule is a relatively new rule

111 *Ibid.*, p. 14.

112 *Ibid.*, p. 10.

113 Gisle Hannemyr, Farvel, Gutenberg,

http://www.bokogbibliotek.no/index.php?option=com_content&task=view&id=823&I, Last visited: 18.09.08.

and the Orphan Works issue considers mostly older works. So the argument about the registration can only be seen for newer works, since the older works were not affected by this rule.

6.3.3. The Nordic Extended Collective Agreement License, a solution for Europe?

The Extended Collective Agreement Licenses can offer bigger possibilities for archives and libraries as well as users to fully utilise the advantages of the digitisation.

In the Norwegian copyright one can find §§ 13, 14, 30, 34 and 36 with models for the collective license, i.e. for photocopies and use in public and private organizations and broadcasting. For the first mentioned exceptions there is no title for individual reimbursement through the copyright owner in contrast to models for broadcasting. All agreements about reimbursement, distribution and claims of the entitlements are effective against right-owners who are not members of the collective societies. But the rights-owner can still claim individual reimbursement to the extent he makes it visible that his work has been used. It is further a prerequisite that the user can use works of the same kind as the ones effective through the agreement on the conditions considered in the agreement for demands and the allocation of claims. Also, the outsider of the collecting societies has no right to impose a ban on the use of his work.

For libraries, archives and museums a new § 16a was implemented and gives the right to the display and preservation of works and opens possibilities for libraries to use new technologies to display material and make copyrighted works available.

Also for the Norwegian broadcaster (NRK) new possibilities to reuse the back catalogue of works or also called “dead archives” was opened through § 32 et seq. of the Norwegian copyright law since time makes it difficult to clear the rights for these works. This collective license is though only effective for works broadcasted before 1. January 1997.¹¹⁴

All the Nordic countries have a similar legislation about the collective license, and it has to be expected that this fact made the EU accept this system as a solution for the clearance of rights.¹¹⁵

114 Free translation of: Avtalelisenser, Ole-Andreas Rognstad, Nordiskt Immateriellt Rättsskydd - NIR, nr. 2, 2004, p. 153, <http://www.jus.uio.no/ifp/markedsrett/publikasjoner/publikasjoner.html>, Last visited 20.08.08.

115 Free translation of: Medier i Norden: Fokus, 2. kvartalsutgave 2003, www.nmn.org/Nordisk?03-2fok.htm, Last visited 10.09.08.

In Denmark the Copyright Act was changed with effect from the 1st of July 2008 and it even broadens the system of collective licenses. This change especially meets the problem of rights clearance issues. It introduces a general admission for agreements with the effect of a collective license. This means that a cultural institution like i.e. a national library, through the new § 16 b (and also the DR- Danish Radio and the TV Station TV2 through the new § 30 a) can enter into an agreement with a collecting society, i.e. the author's federation, about online access of the library's collection.¹¹⁶

With this change the Danish collective license agreement is even broader than in the other Nordic countries, especially with regard to commercial use of works.

- Legal classification

There might be some obscurities about the terminology of collective license and compulsory license. The interpretation of the collective license in Norwegian law shows that the collective license in reality is a compulsory license, since it gives the right to use a copyrighted work without the consent of the right-holder. It could therefore be said that the collective license contains the borderline from the personal right, in the sense that use is allowed without getting the right-owner's consent. This would clearly be a functional form of clearing facing the right-owners. Important is the fact that all collective licenses by law comprise the existence of a beforehand agreement between a representative right collecting society and a group of users in common. In this sense it is also important to keep in mind that all collective licenses by law are strictly narrowed to right-owners that are not a part of a collective agreement order and that the conditions are bound to what other right-owners have agreed through the agreement with the collective society and based on an arrangement the right-owner society has established and the members of this organization have joined on a voluntary basis.¹¹⁷

- Compliance with international conventions

A problem is that Art. 14 and 14 bis of the Berne Convention not include rules that allow legal limitation of compulsory licenses or collective licenses. Art 11 bis of the Berne

¹¹⁶ Free translation of: Ændringer i ophavsretsloven, http://www.danskforfatterforening.dk/Nyhed_Aendringer_i_ophavsretsloven.html, Last visited: 10.09.08.

¹¹⁷ Free translation of: Avtalelisenser, Ole-Andreas Rognstad, Nordiskt Immateriellt Rättsskydd - NIR, nr. 2, 2004, p. 154, <http://www.jus.uio.no/ifp/markedsrett/publikasjoner/publikasjoner.html>, Last visited 20.08.08.

Convention prescribes the personal right to assignment of literary and artistic works to the public both through wireless broadcasting, forwarded broadcasting or video-transmission. Art 11 bis in other words allows compulsory licenses or collective licenses, but it expects that right-owners get remuneration for the use.

When it comes to license agreements, admission to presentation of works is limited through the three-step-test in Art. 9 (2) of the Berne Convention. Under the three-step-test one can only limit the personal right under certain circumstances concomitantly the presentation of the work shall not violent the exploitation of the work and not put the authors legitimate interests aside.

Recital 18 of the Copyright Directive says that the directive does not allude the Member States regime about the administration of rights, as extended collective licenses.

It might become an issue before the WTO that the Nordic collective licenses don't satisfy the criteria under the three-step-test of Art. 13 of the TRIPS Agreement.¹¹⁸ But since remuneration for rights-holders is secured through the license agreement and the EU in its Copyright Directive has accepted the solution through the license agreement, this issue does not seem present.

- Issues

Looking closer on the construction of collective licensing, there still could be a problem that exists with the collective licensing system: the individual remuneration. The collective rights organizations have only to a small degree developed systems for the registration of works that are used. This implements the issue of paying the reimbursement to the right-owner. This could lead to the right-owner having to verify that his work has been used, which in practice can be very difficult. Another issue could be seen for collective licenses for library use. Most of the material used by libraries is used under license terms that give access to presentation of work and accessibility after payment. The same applies to digital use and works that were uploaded on the Internet by the copyright owner himself.

Against this remark one could argue that it is not thinkable that libraries want to further clear the rights they already have made agreements for, apart from that the rights-owner possibly will not be interested in such a solution. This issue could though arise for out-of-print works that still are under copyright protection; but the treatment of these works is

118 *Ibid.*, p. 156-157.

not to be solved in this paper.

An issue could also arise where the copyright owner has given away exclusive licenses about the use of the work. In this situation the collective license could “run over” exclusive agreements. It should be possible for the owner of exclusive rights to deny use of the work by third parties to solve this issue. But as the law is written at this stage, the collective license could penetrate the individual/exclusive agreement. It has to be seen though, that the collective agreement “rules” vary from one Nordic country to another. The most far reaching is the Danish rule, which provides for a general extended license with individual rights “to veto” against the use.

In the system of extended collective licensing the institutions could negotiate the contracts, which are best adapted to their needs. This form of licensing could present the risk that no agreement or a rather restrictive agreement would be reached in other Member States, but at the same time the negotiation gives the possibility to regulate the question of exclusive agreements with the rights-owners.

The overall purpose of the extended license is to create favourable conditions for the use of protected materials from the viewpoint of the right owners, the users, and the public at large.¹¹⁹

6.3.4. National License of the German Research Association¹²⁰

In Germany the German Research Association (Deutsche Forschungs Gesellschaft, DFG) has started an initiative of a system of over-regional licenses for use of academic literature and sources for academic purposes.

The goal of this system is to provide access to academic literature and/or academic sources to every user in Germany especially for access needed for the work of researchers, also when the works are not available through their university or research institutes network. The DFG national license adheres the permission of a non-exclusive and non-transferable license for the use of a product through the DFG national license that is exploited by a publishing company (licensor) through “DFG special collecting domain libraries”, *Sondersammelgebietbibliotheken*, (licensee). The License contains

119 http://www.kopinor.org/opphavsrett/avtalelisens/extended_collective_license, Last visited 20.09.08.

120 <http://www.nationallizenzen.de/>, Last visited 18.09.08.

the right to make the product available in Networks such as Virtual Private Networks additionally to the availability in In-House-Networks. Normally the access to these Virtual Private Networks (and similar) is obtained via a username and a password. Institutional use is for convenience provided via clearing of IP-Number range of the institution.

From digital text- and work issues, as well as for electronic magazines, the delivery of metadata is part of the national license. The metadata has to be integrated to library catalogues without any constraints, so that the digital full text can be accessed or selected directly from the catalogue entry.¹²¹

6.3.5. Solutions discussed in the U.S.

A research study undertaken by the Carnegie Mellon University Libraries in the United States proposed five different solutions to the Orphan Works issue:

- Make Orphan Works public domain either immediately or upon meeting certain conditions
- Provide a reasonable “effort accommodation” with predictable limits or remedies for infringement if the copyright owner later comes forward
- Provide government-sponsored compulsory/default licensing of orphan works for a reasonable royalty fee. Copyright owners who later come forward can collect the royalties paid for use of their work.
- Provide a default license for orphan works for a minimal fee. Published and unpublished works not registered by a certain date acquire orphan status that persists in perpetuity. Copyright owners who later come forward can collect the fees paid for use of their work. Registration is required only for works that the copyright owner does not want to provide under the default license.
- Provide a safe-harbour exemption for non-profit libraries, archives, and educational institutions to enable the reproduction and dissemination of orphaned written work published some number of years ago and currently out of print. Limit the scope of allowable use to non-commercial use. Copyright owners who later come forward can stop dissemination of their work. Registration would be required only for works that

121 <http://www.nationallizenzen.de/ueber-nationallizenzen>, Last visited 18.09.08.

the copyright owner does not want made available under this exemption.¹²² The safe harbour exemption would only be valid for non-profit libraries, archives and educational institutions and create a presumption of orphan work status.

The outcomes showed that making orphan works public domain was not a viable solution and many costs associated with compulsory licensing, including the payment of a royalty prior to the copyright owner coming forward make the proposal very unattractive from the perspective of trying to create a digital library.¹²³ It was also found that legal accommodation that would require libraries to exert a reasonable effort to locate the copyright owners of hundreds of thousands if not millions of books would not have a profound impact on creating a universal digital library because of the transaction costs and risk of liability. A legal exemption would likely be an essential step in solving the orphan works problem, but access to works without the right to use them creatively would create a “read only” culture.¹²⁴

The default licenses approach requires registration and renewal of published work for which copyright owners wish to retain the full copyright term and remedies for infringement provided by current copyright law. Online registration would be required within a 25-year period of publication; software would be required to be registered within five years of publication. Failure to register would not remove copyright protection, but rather signal that the work is orphaned. Copyright owners who did not register but later discover infringing uses may self-identify and claim the fees paid for use of their work. The user of unregistered work would be contingent to confirm the date of the creation of the work and if possible the date of the death of the author, confirming the expiration of the appropriate registration period and posting of a notice of intent to use for a period of six months in a centrally administrated Web accessible database.

This solution avoids the ambiguity and unpredictability of a reasonable effort approach and the threat of litigation. Users have the possibility to know whether a work has been orphaned and when. Also the copyright owners get the power to signal that they have not

122 Denise Troll Covey, Copyright and the Universal Digital Library, Universal Digital Libraries: Universal Access to Information. Proceedings of the International Conference on the Universal Digital Library, 2005, <http://www.library.cmu.edu/People/troll/TrollWebSite.html>, p. 9-10, Last visited 27.07.08.

123 *Ibid.*, p. 11.

124 *Ibid.*

abandoned their work.¹²⁵

The survey closes with the statement that the default licensing proposal illumines and models a path that would both compensate copyright owners and encourage creativity and progress by embracing technology.¹²⁶

If one divides the solutions proposed in the U.S. into two broad categories, the first are those, which rely upon an adjustment to the copyright term, and those that propose a judicial solution by either adjusting existing defences or creating new defences to infringement actions.

Proposals relying on an adjustment to the copyright term:

- Indefinitely renewable copyright

It has been proposed to shift copyright protection to a short initial copyright term, such as ten years, which would be indefinitely renewable. This proposal is attractive on the level that the term of copyright is sufficiently short that works in unstable media would most likely not have degraded to the point where they would not be preservable at the end of the initial term of protection. But under the proposal “Mickey Mouse” would likely never enter the public domain as Disney would have the ability to renew its copyright on comics, films and so on in perpetuity. Also works of enduring value such as films from Alfred Hitchcock would be unlikely to ever enter the public domain.

While most works would enter the public domain earlier, many of the cultural cornerstones would be unlikely to ever enter the public domain. Also, this proposal would require the U.S. to withdraw from the Berne Convention, which mandates that the initial term of copyright protection be no less than the life of the author plus fifty years. As the withdrawal does not seem as an option for the U.S., this system with a short copyright term remains untenable as a solution to the problems posed by Orphan Works.¹²⁷

- Constructive Abandonment

This proposal requires that copyright owners of published works register their works within a twenty-five-year period following publication. If a work is not registered

¹²⁵ *Ibid.*, p. 12.

¹²⁶ *Ibid.*

¹²⁷ Pamela Brannon, Reforming Copyright to foster innovation: Providing access to orphaned works, *Journal of Intellectual Property Law*, Fall 2006, p. 8, retrieved from Westlaw 30.08.08.

within this initial period, it is moved into orphan status.¹²⁸ This would not completely abrogate copyright protection.

The trend in American copyright law for the past half century has been one of expanding protection and scope while lowering the entrance requirements for copyright protection.¹²⁹ This proposal would be a reversal of this trend and is therefore not considered as a solution to this problem.

Proposals proposing judicial determinations:

- Fair Use

An adaptation of the fair use doctrine to provide a safe harbour for users of orphaned works has been advocated to allow for the uses of old works when the transaction costs of seeking permission exceed the value of the license sought.¹³⁰ A completely judicial solution such as this would avoid any problems with inconsistency between the term of full protection and the rate at which an individual work loses value. However, the transaction costs of such a system outweigh the benefits. Every case must be decided individually, the level of uncertainty requisite in this system will drive away potential users who lack the resources to appear before a court for adjudication.¹³¹

- Limitation of Remedies

In its report the Copyright Office proposed a system of limitations on remedies, also called orphaned work defence.¹³² A user who wishes to take advantage of the limitations on remedies must perform a good faith, diligent search for the copyright owner prior to use and provide attribution to the author and copyright owner. If the user is sued for copyright infringement upon a determination that the user meets the statutory requirement, the court may only award reasonable compensation for the use. If the use is personal and without any direct or indirect commercial advantage, and the user immediately ceases the use upon receiving notice of infringement, the court may not award any monetary damages.¹³³

128 Lawrence Lessig et al., Comments of Creative Commons and Save the Music, 25.3.2005, p.12, <http://www.copyright.gov/orphan/comments/reply/>, Last visited 10.09.08.

129 Pamela Brannon, Reforming Copyright to foster innovation: Providing access to orphaned works, *Journal of Intellectual Property Law*, Fall 2006, p. 9, retrieved from Westlaw 30.08.08.

130 William Patry & Richard Posner, Fair Use and Statutory Reform in the Wake of Eldred, *California Law Review* 2004, p. 1650.

131 Pamela Brannon, Reforming Copyright to foster innovation: Providing access to orphaned works, *Journal of Intellectual Property Law*, Fall 2006, p. 10, retrieved from Westlaw 30.08.08.

132 Report on Orphan Works, January 2006, p. 127, <http://www.copyright.gov/orphan>, Last visited 10.09.08.

133 *Ibid.*

Also this system fails to provide the pre-emptive certainty necessary to prevent self censorship. The Copyright Office statutory language provides a defence to an infringement action. Users might be unwilling to risk the possibility of a lawsuit, even if they would be likely to prevail.¹³⁴

6.4. Scope of solution of the Orphan Works issue

One could raise the question if the solution to the orphan works problem should apply to all users and uses of designated orphan works.

It could be difficult to distinguish commercial from non-commercial use and any uncertainty would reduce the value of the solution and its impact on the issue.

Any solution should be divided for its purpose; in non-commercial and commercial use and considering the two different user-groups, the group using works for educational and research purposes and the group using works solely for private use.

6.5. Evaluation of solutions

6.5.1. Solution provided by the EU

The Subgroups recommended approach build on the European concept of mechanisms in each Member State having a minimum common denominator and mutual recognition of national solutions. In practice this means that once common core principles and due diligence guidelines for identifying and/or locating rights holders are established by a regulation or a directive, material whose rights holders have been considered diligently searched for should also be considered accordingly in other Member States.¹³⁵

Different treatment of the same act in different Member States may lead to legal uncertainty with regard to what is permitted under the exception. Depending on the country, identical acts could be legal or illegal. The causes of this problem lie in the different ways in which Member States have implemented the exception into their national laws.¹³⁶

Due Diligent Search criteria are nowadays a very common and in itself a very handsome

¹³⁴ Pamela Brannon, Reforming Copyright to foster innovation: Providing access to orphaned works, *Journal of Intellectual Property Law*, Fall 2006, p. 10, retrieved from Westlaw 30.08.08.

¹³⁵ Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works, i2010: Digital Libraries High Level Expert Group- Copyright Subgroup, p. 18, http://ec.europa.eu/information_society/activities/digital_libraries/hleg/hleg_meetings/index_en.htm, Last visited: 09.06.08.

¹³⁶ Green Paper, Copyright in the Knowledge Economy, Commission of the European Communities, <http://www.euo.dk/upload/application/pdf/53dc61e3/20080466.pdf>, p. 17-18, Last visited 06.08.08.

way of finding a general solution for this issue. It is though questionable if not only general guidelines on these criteria can be found in discussions with the Member States, but also if these in the end risk being too wide. Search criteria will always also be dependent on the technical possibilities, and as already seen and learned in the past years the technical options change rapidly. There is still the issue that these criteria in the end are too porous and do not conform to the high standards that are set for copyright protection. Copyright-owners rely on the safeguard of their rights through the Copyright Law, and especially on the remuneration. This should not be undermined by possibly poor compromises, through an adherence of the guidelines in European legislation or not, that have to be found to fulfil with the want of all Member States.

6.5.2. Solution provided by the Nordic Extended Collective License Agreement

Owing to technological progress, the use of protected materials is more and more often taking place far beyond the possibility of control by the right owners themselves. Collective administration of rights is in such situations the only solution that works.¹³⁷

Since no organization can represent all the authors of the world, a pure contractual alternative is conceptually impossible. There will always be authors who have not authorized or will not authorize anyone to represent them. This does not mean that these authors - when asked - would be absolutely opposed to the use of their works.¹³⁸

The Nordic extended license system has worked with respect to broadcasts for over 30 years. In the 1980s it underwent a kind of renaissance; it was observed that extended license was precisely the best solution to the -sometimes difficult- problems of reprographic reproduction, cable retransmission, and even re-broadcasting.¹³⁹

A question that often is raised is what will happen to the money the users paid to the collecting societies if the rights-owner is not locatable and the remuneration is not paid to him. It is at this stage not clarified what this money should be used for. For the purpose of supporting copyright and culture, this money could be used for the benefit of future cultural creation.

All in all this sort of license agreement, despite its possible issues, seems to provide for a

137 Åse Kleveland, Copyright functions well in the Nordic countries,

http://www.kopinor.org/opphavsrett/avtalelisens/extended_collective_license, Last visited 20.09.08.

138 *ibid.*

139 *ibid.*

solution in the field where they are legal through their legislation. It remains though as a national solution only valid for the national territory and therefore is a good approach where a European solution via the harmonization of the European Copyright Law can not be found.

6.5.3. Solution provided by the U.S.

The U.S. approach already starts with a different legal background than the EU law considering the Fair Use-Doctrine which already gives more “*leeway*” than we have at this stage in Europe, so solutions building from this Doctrine can not be considered in the same way for Europe.

The diligent search criterion, which decides about infringement of a work, is seen as too vague in the U.S. proposal. The search criteria, as criticised in the European approach, must be clear and shall not be open for interpretation.

The registration approach would finally be a breach of international treaties the U.S. are bound to. This, as already mentioned, also is the case for the proposed solution via an indefinitely renewable copyright.

From a European point of view, and as already discussed in part 6.3.5. each category has to be seen as to in the end fail to provide a complete solution to orphan works problems.

7. Summary

Recognizing that different solutions for different purposes are needed, the approach has to be divided in the group of commercial use on the one side and non-commercial use on the other side.

In general, the extended collective license agreement, accepted by the EU through Recital 18 in the Copyright Directive, and as already applied in the Nordic countries, is to be seen as the favourable solution although it is known that it is not tailored for Orphan Works. Still it is seen as capable of being able to, to a large extent, eliminate the issue of unknown or non-locatable right-holders.¹⁴⁰ Seen that the effect of a collective license, according to Art 5 of the Berne Convention, would be restricted to the national territory, some general requirements should be harmonized through the EU for a common European solution.

It should be required that the organization represents, with extensive coverage, the authors in its field in its country. The fulfilment of the requirements can, when necessary, be controlled by setting it as a condition for the extension effect of the agreements that a public authority has accepted the organization for this function.¹⁴¹ The ideal would of course be an organization that represents the rights-owners of all the countries concerned in the case of use of international repertoire.

The degree of organization of right owners varies greatly from one field and from one country to another. In music one can find the highest degree of collective administration in the field of music, i.e. the collecting society TONO for Norway, GEMA for Germany or SACEM for France. The system in other fields is only in a few countries as high advanced as it is in the music field, and in many countries administration is still developing or non existent.

A requirement that the Commission could set in this respect is a good national representativeness, since in some fields a comprehensive international organizational structure is lacking.

140 Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works, i2010: Digital Libraries High Level Expert Group- Copyright Subgroup, p. 13, http://ec.europa.eu/information_society/activities/digital_libraries/hleg/hleg_meetings/index_en.htm, Last visited: 09.06.08.

141 http://www.kopinor.org/opphavsrett/avtalelisens/extended_collective_license, Last visited 20.09.08.

For the issue of non-represented rights-owners three alternative solutions can be seen.

- Indemnity Clause

Into an agreement one could incorporate an indemnity clause by which the organization assumes the liability for the payment of remuneration to non-represented rights-owners. However, this alternative only eliminates financial liability under civil law; the user is always responsible for any infringements he has committed. The position of the user is therefore not safeguarded by this provision.¹⁴²

- General Authorization by Law

Into the law one could incorporate a provision by which a copyright organisation is given a general authorisation to represent right owners or by which it is presumed that the organisation has such right. This alternative hardly differs from those of extended licenses, which do not give the organisation a general right of representation but only extends an agreement concluded by the organisation also to cover non-represented right owners.

- Provision of Non-Voluntary License

Into the law one could incorporate provisions of non-voluntary licenses whenever permitted by international conventions. One would in this case not need the consent of rights-owners at all for the use of protected materials. Rights-owners only have a right to remuneration. The disadvantage of this license is that it is considerably farther-reaching limitation on rights than the extended license and it significantly weakens the negotiating position of right owners.¹⁴³

For the different purposes of use, the following solution seems appropriate:

- Non-Commercial use

For the purposes of non-commercial use of Orphan Works, the Nordic extended license seems to be the best applicable solution. The extended license goes back to and uses in a wider sense than today, an in most countries known system, the collecting societies. These societies already have the role of representing the rights-owners and making agreements with the users of the works. Giving the societies the role of administrating the extended license is just an extension of their duties.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

- Commercial use

The Danish approach for the extended license seems to be adequate for the purposes of commercial use of works. When cultural institutions and/or public broadcaster want to open their databases for online access, they should have the possibility to enter into agreements with collecting societies that act in the agreement of their members and through the certainty of remuneration for use of works also act for outsiders. This solution may be too wide and could provoke opposition. But still it could be seen as a subsidiary solution if no answer can be found for the commercial use.

It is recognized that the Commission has seen the possibility of solving the Orphan Works issue through the use of the extended license system in its Final Report. It is hence not understandable, why it did not elaborate more in depth on this solution.

If the Commission decides not to propose a harmonisation to the different national copyright laws in regard of the Orphan Works issue, it is still needed that the Member States legislations secures that the national solutions are accepted in the other Member States. This is the least common denominator if one wants to avoid the requirement of bilateral agreements between the 27 Member States and the EFTA-States, which otherwise will lead to time loss, more unsolved question and most severe for the i2010 initiative: a “*rag-rug*” when it comes to rights clearance for the flagship project, the European library.

8. Conclusion

It is proposed that the Commission elaborates on the Extended License System that is used in the Nordic countries. For Non-Commercial use the extended license provides a solution that has already been used in the Nordic countries for many years and has shown its reliability. For Commercial use the Danish approach should be considered, although it is seen that it might lead to controversial discussions because of its extent.

In the future it is likely that libraries will become the distribution channel and digital gateway to information. The Commission should therefore avoid the least common denominator of acceptance of national solutions in each single Member State and take the step forward to one solution for the Orphan Works issue in Europe.

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