

Statement on orphan works

Definition of orphan works

- 1 An orphan work is a work protected by copyright, but the current owner of the copyright is unknown or untraceable by reasonable enquiry. The current owner of the copyright might be the author or other creator, some other first owner of the rights (such as the author's employer or a publisher) or a successor of the first owner.
- 2 A work is not an orphan merely because the author, rather than the current rights owner, is unknown or untraceable, nor is a work an orphan merely because a published work is out of print or because the copyright owner has not responded to communications which he or she has received.

Nature of the problem

- 3 The author or other rights owner of a copyright work is entitled to a fair return on his or her investment of intellectual effort, creativity and innovation and of money and other resources in creating that work. Few copyright works, though, are wholly original; instead they are founded upon other works created before them. Creativity and innovation breed upon creativity and innovation. This interdependence is nourished by limitations and exceptions to the rights of a copyright owner which permit limited uses of copyright material without consent so long as they do not significantly interfere with the rights owner's exploitation of, and benefit in, the work.

When use goes beyond the scope of the limitations and exceptions, permission must be obtained to avoid infringement. This creates a problem if the rights owner cannot be found. Should the use cease, thus stifling creativity and innovation, or should the risk of continuing without permission be taken? Since rights holders are themselves also users, this is a universal problem.

- 4 For libraries, archives, museums and similar educational, cultural or research institutions, in addition to the basic problem there is another aspect to it which requires attention. Such institutions may themselves be rights owners and users, but they are also intermediaries, making copyright material available for use by others.

In the case of not-for-profit institutions which operate for the public good, there is an

obligation to make material as widely accessible as possible. With the communication facilities offered by the internet, the expectation is now that this will mean digitisation and the availability of the digitised material on-line. Projects to create and make available digital surrogates are expensive and for the most part feasible only if they are of a scale to reduce the unit costs substantially. In this context orphan works create very significant problems: the cost of contacting thousands of rights owners would be daunting, but the cost of seeking to identify and trace them would make mass digitisation of copyright materials impracticable.

Solutions

- 5 There are several possible approaches to provide a mixed economy solution to deal with orphan works and to afford safe harbour status to not-for-profit institutions operating for the public good (see 4), each of which has a place in appropriate circumstances:
 - i) enable users to take out a licence from an appropriate body, the fee for which is passed to copyright owners if they subsequently appear within a period defined by statute or is otherwise used for an appropriate purpose as also prescribed by statute (such as being returned to the licensee or being used for relevant charitable purposes) (the ‘licensing solution’);
 - ii) allow users to use orphan works without permission under a new exception based on a reasonable enquiry to identify and locate the copyright owner, the application of which would depend on the court’s assessment of the diligence with which users had conducted their enquiry (the ‘diligent search solution’). Any legislation for this solution should also deal with the rights of a copyright owner, should he or she come forward, to reasonable remuneration from the user or to object to continued use; and
 - iii) allow not-for-profit educational, cultural and research institutions (see 4) working with large numbers of orphan works to use them without permission under a new exception, the application of which would depend on the scale of the project and the proportion of orphan works involved, based on a reasonable assessment which has shown them to be predominant; the publication of notices inviting copyright owners to come forward; the use as appropriate of readily-available information sources to locate known rights owners; the publication and operation of clear policies on the taking down of works to the use of which copyright owners reasonably object; and willingness to pay appropriate fees for continued use on the basis of the fees that would have been payable had prior permission been obtained (the ‘mass digitisation solution’).
- 6 With some kinds of work, for instance published literary works and some artistic works, a licensing solution will often provide all that is required. It must be supplemented however by a solution to enable mass digitisation projects and a diligent search solution to deal with circumstances where licensing is not an option and the use of orphan works is not on a large scale.

An obvious category of such orphan works is unpublished literary material, such as private letters and diaries, which are the source material of much historical and literary, and some scientific, research. There are and can be (without compulsory collective

licensing) no licensing body to represent the rights owners, and use is often relatively small scale.

- 7 As copyright works age, their economic value for the most part declines. On the other hand, the economic value of the artefact which embodies the copyright work and the cultural, academic and social value of the work itself will tend to rise. Thus, the economic value of the copyright work embodied in a long out of print publication will decline while the volume itself might become rare and collectable and the contents become valuable as source material for researchers. It is desirable that this change should be recognised by the adoption of cut-off ages, perhaps different for different kinds of work, after which:
 - i) it is reasonable for works to be considered to be orphans (perhaps 50 years after creation); and subsequently
 - ii) the requirements for searching for rights owners are dropped altogether (perhaps 100 years after creation or, if published, 85 years after publication in line with current US provision for pre-1923 published works to be in the public domain).
- 8 All solutions should require proper attribution, identifying wherever possible the author, the rights owner and the work, though it is in the nature of orphan works that the copyright owner often cannot be acknowledged. Any moral rights of authors should also be properly respected.

Issues to consider with these solutions

- 9 There are some issues which would need to be addressed in connection with these solutions:
 - i) in countries where there are no compulsory collective licensing schemes, licensing bodies can currently issue licences only if they are mandated to do so by their members. The nature of orphan works however is such that there are no known or traceable rights owners to give the necessary mandates. That being the case, licensing bodies must be willing to issue licences without a mandate or legislation must authorise them to do so and provide them with an appropriate indemnity;
 - ii) the bulk of the fees paid for licences under the licensing solution will not be passed to owners of the rights in the content being licensed. There is a clear need for transparent arrangements which will determine what is done with the money;
 - iii) those who assert claims to the copyright in orphan works should provide reasonable evidence of their ownership of the rights;
 - iv) any remuneration payable to rights owners who come forward under the diligent search or mass digitisation solutions should be equitable to both parties and should not involve any payment of damages;
 - v) much attention is being paid to what would constitute a suitably diligent search, but it must be recognised that this is only a partial solution to the whole problem (see 5 above). Diligence will vary depending on the nature of the materials to be

used and the commercial or non-commercial nature of the proposed use. The library, archives and museums communities are cooperating with the European Commission i2010 initiative in seeking to define diligent searches for different classes of works for digitisation for the European Digital Library project;

- vi) rights owners are entitled to reassurance that the avoidance of any form of diligent search in a mass digitisation solution does not unduly harm their interests, so the safeguards around such a solution would need to be carefully defined and properly applied;
- vii) in all cases, users need legal certainty. The purpose of solutions to the orphan works problem is to encourage use and to prevent risk. Neither can be achieved if the solution offered does not provide certainty that there remains no liability to infringement action; and
- viii) without some kind of preventative action, the orphan works problem will continue to grow. Provision therefore needs to be made for the secure supply of up-to-date rights information in the metadata for new digital works.

LACA: the Libraries and Archives Copyright Alliance
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About LACA

LACA: the Libraries and Archives Copyright Alliance, is convened by CILIP: the Chartered Institute of Library and Information Professionals. LACA brings together the UK's major professional organisations and experts representing librarians and archivists to advocate a fair and balanced copyright regime and to lobby about the copyright issues affecting the ability of library, archive and information services to deliver access to knowledge in the digital age.

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