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Clearance of rights in mass digitisation – Issues and Solutions

Introduction

It has become a political goal of European culture policy to establish a European database or information system, Europeana, giving online access to European cultural products. For this project to succeed, it will require digitisation of European books, journals and other culture products on a massive scale.

If Europeana is to contain works published in recent times, i.e. works for which the term of copyright protection has not expired, this requires either

- an exception or other sort of legal mechanism allowing the digitisation and making available to the public of the works,
- or
- a license agreement with the authors and other rights holders, or organisations, e.g. collecting societies, representing these rights holders.

European copyright legislation does not contain a specific exception permitting libraries to digitise protected works and make them available to the public outside the library, and in the majority of EU Member States, collecting societies can only enter licence agreements on behalf of their members. How, then, might it be possible to clear the rights of works of authors and other rights holders who are not members of a collecting society and cannot be located? That is the Orphan Works problem.

Libraries do not want to digitise “orphan works” as such. They want to digitise certain types or classes of protected works, some of which may be orphan. In all cases, these types or classes of work are no longer subject to commercial exploitation. (It would make no sense for a library to digitise works that are commercially available.) Typical digitisation projects concern mass digitisation, i.e. digitising large numbers of works which are no longer available commercially. The clearing of rights in these cases concerns two actions: digitisation and making available to the public.

Digitisation

Depending on the national implementation of art. 5.2.c and 5.3.n of the Information Society Directive, libraries may digitise and make available on-site protected works without any licence agreement with rights holders. However, in many (perhaps even most) Member States a licence to digitise will be necessary.

Making available to the public

It is the ambition of Europeana that the digitised material should be made available to the public outside the premises of the library. The whole point of Europeana is to create a common European entry to the digitised European Cultural Heritage.

This implies that on-site access in accordance with art 5.3.n of the Information Society Directive will not be sufficient. Either there must be an exception allowing remote access, or, because of the number of rights holders involved, rights must be cleared on a collective basis with right holder's organisations, e.g. collecting societies or other authorised organisations.

Extended collective licensing

In the Nordic countries a collecting society may have a legal mandate to engage in collective license agreements which are not only binding for members of the collecting society but also binding for rights owners who are not members of the organization.

If the rights to digitise and make available to the public are cleared on the basis of an extended collective licensing agreement, the licence agreement covers all works of the specified type or class. Whether some or all works may be orphan, is not relevant.

Whether the rights owners are identifiable and locatable first becomes an issue when the collecting society comes to redistribute revenue to the rights holders. Under extended collective licensing, the orphan works problem boils down to an issue of redistribution of revenue by collecting societies.

Exception

Another solution may be an exception allowing an authorised body or organisation in the country of origin to deem works to be orphan and grant permission to use these works in specified ways. Such solutions are seen in Canada, Hungary and Japan.

In view of the fact that libraries do not want to digitise "orphan works" as such, but works defined by some other characteristics, say year of publication, this solution requires that the following three steps are undertaken:

1. The institutions wanting to digitise and make certain classes of works available to the public must identify those works which may be orphan. To do this would require that searches or investigations have been conducted in order to satisfy the criteria set by the Authorising body for the works to be classified as orphan. If the criteria are met the Authorising body may then give the desired permissions.
2. The in-copyright materials which are not orphan may be cleared by collective licensing agreements with respect to those rights owners who are member of the collecting society.
3. For works whose authors are not members of collecting society, permissions must be cleared by individual agreements with the rights owner. This will probably be the predominant situation in most European countries

The transaction costs involved in this process, i.e. the process of identifying the orphan works and clearing the rights of the rest, be it by collective agreement or on individual basis, will be prohibitive, except for relatively small and well defined collections, which can be defined *en bloc* as being orphan.

In order to make the process of rights clearance economically viable, it would be necessary to specify some additional criteria which might be used by the Authorizing Body to grant permissions, e.g.:

- For monographs the decisive test whether a work may be deemed orphan or not is whether rights holders are found in the ARROW system. If rights holders cannot be identified and located in ARROW the work is by definition orphan.
- Cut-off points. I.e. a decision by the Authorising body, or EU-wide agreement, allowing works of specific types, published before a specified year, to be digitised and made available to the public. Cut-off points may vary according to types of work (e.g. newspapers published before 1940) and other circumstances. No one-size-fits-all principle.

Finally it should be stressed that a solution based on an exception should not be restricted to published, text based works. Audio-visual and unpublished works constitute important parts of the European cultural heritage.

The Authorising Body

The Authorising Body must be open, transparent, and publicly accountable.

The Authorising Body needs to be given, by law, authority to grant permission for all types of orphan works, ranging from commercially produced books, journals and films, to unpublished private photographs and sound recordings. Simplicity is essential.

Remuneration paid to Authorising Bodies for the use of orphan works must be accounted for. If the money has not been rightfully paid to a real right holder, it should be returned to the person or organisation that paid it earlier or – if that is not possible – should be given to creative bodies such as artist groups or public libraries.

Mutual recognition of solutions

Both these solutions imply a compulsory element with respect to rights owners who are not asked to give permission; either because their permission is not required or because they have not been found. The basis for these solutions is, therefore, an authorisation to the Collecting Society or an exception to author's rights given in the national legislation of the Member States.

Copyright legislation is territorially limited, and cross border copyright protection is based on reciprocal protection. This means that neither of these solutions is valid across borders in other Member States, and thus would not make it possible for Europeana to give access to all material in all the Member States of the European Union.

What is needed, therefore, is a mechanism, within the legal framework of the Community, of mutual recognition by Member States of their solutions.

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