



EUROPEAN  
VISUAL  
ARTISTS

## **EUROPEAN DIGITAL LIBRARIES, HIGH LEVEL COPYRIGHT SUBGROUP ORPHAN WORKS SECTOR –SPECIFIC GUIDELINES**

### **Introduction**

EVA appreciates that through the process of opening the issue on orphan works - which the copyright subgroup is enquiring – authors' organisations are included in the process of investigating the feasibility of the EDL. We would favour a continued inclusion of authors' organisations into the entire process and the HLG debates.

EVA would like to seek some clarification on how the groups working actually on orphan works issues are integrated in the findings of the HLG which at the same time continues its conclusions on the same issue. How is ensured that the outcome on the different levels are coherent.

EVA would like to ask for a more detailed enquiry on the extent of problem the users are facing. We believe that in some sectors – such as the fine arts - there are very few cases.

EVA believes that public funded entities should do their utmost to respect the author's rights and to prevent infringements.

Finally, the EVA members have set up a circle for collecting societies to facilitate easy access to world wide licenses on works where the authors are traced called [OnLineArt](#). An extension for works with untraceable authors for non commercial archive uses and networks of databases could be feasible but would require a legal basis.

### **Definition of the sector**

1. The definition by work categories such as visual, text, film, music is an important step ahead. However, a distinction between the different primary uses and the usual contractual situations and extents of licences would be even more useful. For example: as concerns visual works embedded in other works the contractual situation will provide us with clues on who should be addressed by users. The legal scenarios and concerned stakeholders can differ quite considerably. In our view the links between the working groups of the different sectors are essential for the value of the results. They are of importance for the entire issue of European digital libraries -not limited to the orphan works debate.

2. For the definition as a protected work the distinction between amateur and professional authors is inappropriate. In the mentioned case of an archive of works made by non professional authors the same legal problems occur like with other work collections.

In any case, if the name of the author is indicated or possible to discover a search should be made possible and user should seek authorisations prior to any use. Collecting societies could play a role provided that they are sufficiently remunerated for their services and obtain a legal basis covering such activities.

3. The authors and heirs should always be in the centre of any search. Any other party claiming to be a right holder would need to prove valid rights transfers. For instance in case of untraceable publishers such prove can not be made and as a consequence it must be presumed that authors of embedded rights have not transferred any of the rights in question.

A user who published a work with other works embedded might only be holder of a license for the particular use and not a rights holder in any broader sense which could licence himself. This is regularly the case if a collecting society has granted a licence for the publication because they only authorise a specific use and do not transfer rights.

4. The LACA document questions under item 3 the value of copyright protection. New works would result from inspiration out of the pool of pre-existing works rather than being really original. If access to this pool would be hindered by individual authors and the protection which copyright grants to them, the process of creation of new works would be hindered.

The legal findings are unfortunately not precise. With the creation of a protected work the author obtains a catalogue of rights. The rights in question for scanning, digitising and making available (or the communication to the public right) are so called exclusive rights, which means the right to decide whether a third party may use the work or not. There is no obligation for an author to authorise uses for which he holds exclusive rights at all. If an authorisation for a use is given the condition of payment of a license fee is set.

The use without prior authorisation is always an infringement of the exclusive right.

In specific cases limitations and exceptions of the exclusive rights are provided by legislation. If these exceptions hinder the normal exploitation they are combined with a remuneration right.

Conflicts of different rights are a general situation everywhere to be found in the legal sphere. The rights of individuals have their limitations where other rights of individuals or the community come into play and the borders need to be defined for legal certainty.

For the uses in question, the scanning, digitising and publishing on the web site of whole archives and libraries or large parts the European Directive 29/2001 did not include an optional exception in article 5.

For instance to first scan, digitise and make available without prior authorisation would mean to ignore the legal fact of mass infringements. A known commercial entity has given this bad example in the past. For defence it was explained to be prepared to take those works off the net where authors or rights holders intervene. For public cultural institutions such strategy should be excluded. – The Flickr/Library of Congress strategy should not be endorsed.

5. Besides, the sector concerned includes works of fine arts not only included in text and other publication but as collection of originals for instance in a museum or an archive. This category also comprises works of fine arts created by photographic techniques.

EVA would be interested to have a clearer picture on figures to be expected and evaluations made by the archives, libraries and museums on the numbers of works which are intended to be entered into a digital library. What qualifies in the view of users as mass or bulk material digitisation and which are other categories?

## **Stakeholders**

6. In case of works embedded in text books and comparable publications each image has two authors: the artist of the work of art and the photographer. In general the name of the author of the fine arts work is indicated while the photographers are only indicated in more recent publications.

7. Collecting societies for visual arts play an important role in the sector. For authors of fine arts they are the link to any user because there are no other intermediaries in play. Artists' works are completed by the author and do not need to be transformed by an industry to become a "product". For photographers the collecting societies do only intervene for collective rights. The societies have built up efficient databases and channels for collection and distribution world wide which could be helpful for solving the issues discussed.

8. Publishers in general do not dispose of the rights for scanning and digitising of the art work. Collecting societies strictly limit licences for the uses required. No supplementary rights are transferred.

## **What is orphan in the sector?**

9. A central question is to clearly identify the real extent of the problem. As it is stated in the document of LACA under point 4 the contacting of thousands of authors would be - already -daunting. However, the problem we are dealing with here is not the burden on users to clear rights in general but the particular burden caused by untraceable authors. The borders between these two different points seem to be blurred.

As concerns works of fine arts the number of orphan works should be very low. Works collected by an archive or other collection should systematically carry the name of the author. If works of an artist of the 20<sup>th</sup> century have been collected by a public body or published in another work its author is likely to be traceable even if not represented by a collecting society. The number may not be expected as significant.

In the field of visual works the collecting societies manage rights based on the name of the author and not by title of works which would make the search easier. Even if artists are using pseudonyms the collecting society would know to which author it is related. Many artists choose a pseudonym for their work identity in order to protect their private sphere.

10. The same appears to be the situation for works of fine arts embedded in other publications.

11. If the author's name is known but is no member of a collecting society and not known otherwise a search should be undertaken. Collecting societies could in principle play a role in this. It could be further enquired by the EVA members whether a check list could be build up and an internal database for the particular purpose in addition to the existing data. A broadening of the data network including museums and archives could be envisaged. As collecting societies are not for profit and need to receive the means to cover the costs.

12. The problem of orphan works might appear more often with photography because the authors' names are indicated less regularly. Elder book publications do not carry detailed rights indexes. If requested by the stakeholders the collecting societies could as well play a role but in case uses would be required without prior authorisation a legal basis would be necessary.

### **Conclusions:**

13. First of all the exact extent of the problem should be evaluated in order to find the most appropriated solutions. The orphan works problem should not be mixed up with the burden of clearing rights in general.

For works of fine arts the problem of untraceable authors appears to be minimal. Global rights are easily accessible through the local collecting societies which participate in OnLineArt. Within this one-stop-chop circle a special tariff for archive uses was developed. Works of artists not covered could be included in an extension of this system but would require a legal basis.

14. Mixed publications which include text and visual works have complex rights situations which are solved in the best way by direct intervention of the concerned authors, rights holders and collecting societies. Rights on the visual works might not share the same destiny as the other parts of a publication – different dates of expiry of rights for the different parts of a publication, different status as concerns the traceability of a right holder, etc.

Rights for the required uses on fine arts published in other works are regularly not cleared beforehand by publishers if the collecting society had licensed the printed publication because the collecting societies limit licensing agreements to the requested publication. The publisher does not become a right holder.

15. Other visual works, such as photography, illustration, caricature might be licensed with the publisher but the extent of licenses needs closer inquiry. Authors of older publications might still be traceable through a collecting society even if the publisher of a publication and/or the text author might not. Also in these cases the direct intervention might be more promising.

16. Sector specific treatment and direct intervention of authors and their representatives concerned should be enabled also for works included in text publications in order to find the most appropriate solutions where it is possible for the benefit of all stake holders.

17. The users wish that they could exercise all uses necessary for all works in their collections but without taking any risk. The collecting societies could help with setting up concepts for the search of authors. The search could be made in a standardised way, crossing borders by making use of the existing international networks of collecting societies. The costs for such services would need to be reimbursed. Collecting societies could also extend the licensing for untraceable authors but would need a legal basis.

18. A public registry or database of works which are qualified as orphan or which have a traced author or other rights holder might cause other conflicts. To the broad public they could give the impression of legal certainty. The power of such public registries could force authors to register their works in order to ensure protection. But others than industrial property, copyright protection is granted from the moment of creation without any further act necessary.

19. EVA is clearly opposed to the introduction of cut-off ages. The presumption that the economic value of a work would decline with time is in general questionable but in case of visual works not useful at all. The time when a work will receive economic value is unpredictable for visual works and in particular works of fine arts. They are not produced – like some categories of text publications - because of the expectation of a profitable market. Artists sell the originals and thus - to some extent - hope to invest into their market. When the works of an artist become successful or not at all is impossible to predict. Some artists career start early but in general it takes a lifetime.

The expiry dates for works is not oriented on the date of publishing. The concept of allowing that for a certain period the fruits for an investment may be drawn without disturbance by competitors is one of the field of industrial property rights. We are here in the field of copyrights or author's rights where the rights run for life time and an average two further generations not only to benefit from any economic fruits but also to decide on uses of the works and defence of moral rights.

For publications with embedded works the application of cut-off ages on the publication would be a potential infringement of rights of authors on the embedded works. Their expiry date might be far different and the authors might be traceable.

20. In order to prevent a growing orphan works problem, the users should always indicate the author's name – what they are usually obliged to. Thus, we can already observe that since the 1980s when many of the collecting societies for visual arts were created and insisted also in legal procedures, the practise by users to indicate names has much improved. This activity needs to be continued and its usefulness deserves to be formally recognised. Only in the UK and Ireland an author can be obliged to waive this – and other - important moral right – an option which should be banned.

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Carola Streul  
Secretary General