

**The subject is challenges and opportunities with regard to Orphan Works.
My presentation will focus on the perspective of the European image industry.**

Picture agencies market and license images on behalf of visual creators. As such they are expert in digitization – for the last 15 years our members have edited, scanned, keyworded and put millions of pictures online at their own risk and cost.

All of this has happened with respect to present copyright and authors' rights rules. Copyright is the backbone of our industry.

Picture agencies also hold Orphan Works in their files, from illustration books or when the photographer has moved or changed name. On the other hand, photographic associations in France have protested against the increasing use of the denomination “DR” – *Droits Réservés* – abused by publishers to publish pictures in the printed press or on the internet - an Orphan Work notice but with no legal basis.

It is only recently that the issue of Orphan Works has been identified as worthy of new legislation. This is mainly due to the mass digitization programmes both in Europe and the USA, notably: Europeana, the European Library which secures free access for the public interest, and the Google Book Project, a private undertaking which proposes commercializing these so called orphaned works.

Since the pressure for change comes from the user, any change is most likely to be challenging, if not threatening, to copyright holders.

In the image industry, we see that we must work toward **the best possible solution:**

- make sure that any legislation will not in effect worsen the situation of a fragile creative industry, which has been fighting for years against decreasing prices while adapting to the new online environment.
- identify the opportunities brought about by new legislation in order to fight against bad crediting of pictures, including (but not limited to) the internet.

CHALLENGES AND OPPORTUNITIES

We identified three challenges and one opportunity.

1) The first challenge is to avoid copyright being weakened / sacrificed for the sake of middle-term digitization projects.

To start with, we would like to put the issue into perspective. In some countries pictures are only protected up to 50 years after the date of publication. This means that all pictures published before 1959 may be digitized without having to look for the lost author.

The Orphan Works issue is a recent issue which only emerged with the plans to mass digitize our cultural heritage. Picture agencies have always held Orphan Works in their files, yet have never identified Orphan Works as a major issue. Instances have always been handled on a case by case basis.

Mass digitization programmes in Europe and the USA (through Google) will certainly be completed within the next few years.

We therefore believe that it would be fundamentally wrong to give up basic copyright principles which have worked for more than 200 years to protect the most fragile elements of the cultural chain, on the grounds that it is “**quicker**” to carry out these short to middle-term mass digitization projects.

The Google Book Settlement is an outstanding illustration of this point. In the name of efficiency, copyright rules are being totally sacrificed, with Google imposing an **opt-out** rather than **opt-in** solution to authors. Previous disregard of copyright has enabled Google to scan 10 million books in only four years. If the Settlement is agreed, Google will be authorized to continue in the same way: scanning books completely legally and under its own special conditions.

2) The second challenge is to avoid shifting revenues from the provider of the content to the user of the content.

At the center is the concept of **commercial usage**. Will the Orphan Work be used for a not for profit project or can it also be licensed for other usages? If a commercial license is issued, where do payments go? Who benefits?

As simple as it sounds, it is sometimes difficult to draw a clear line between what is a commercial usage and what is not.

An old picture recognized as orphaned in the museum's library may be printed on a cup and sold in the museum shop; another "orphaned" picture may be used on the website of a not for profit organization to generate revenue for commercial uses. In these examples, works recognized as orphaned compete against pictures which are available on the market but for a fee.

Two things are wrong here:

- Competition: "Abandoned" works compete with "living" authors
- Double profit: The user benefits twice from the exploitation of an orphaned work. He may both **use** and **license** it.

3) The last challenge is specific to the image industry.

It is the sheer number of potential orphaned pictures produced every day.

Millions of copyrighted pictures are produced every day and uploaded onto the internet. Due to poor crediting, billions of pictures are potentially orphaned, not because they are but because the name of the author is missing.

Technology and internet usages have their role to play in this situation but poor crediting is the main culprit.

Not only in countries with a "**copyright tradition**" such as the USA (50% of the world market for imagery) where there is no obligation to name the photographer, but also in countries with strong **authors' rights / moral rights** traditions, such as France, poor crediting has become a major issue. French photographers and picture agencies associations, such as our French member SNAFIG, have been pointing out the issues of "DR" for several years.

“DR” stands for “Droits Réservés”. Originally used mostly for press pictures when the photographer did not wish his name to be published, it now refers to the steadily increasing practice of adding this notice to a picture published when the author is unknown.

It is in effect an “Orphan Work notice”, but with:

- No definition of search criteria, in fact it may be that no search has taken place
- No control over the search / self-regulation
- No payment of a licensing fee / free use of the work

We see here that the photographic industry too has issues with Orphan Works, but from another perspective as libraries.

We understand that libraries wishing to digitize their collections are less concerned about usages on the internet than clearing the rights of old material in their files.

However, any legislation affecting former works, such as a mandatory exception for OW, may have, as we have seen in point 2, an effect on future works and usages. Legislation on orphaned works will therefore have to deal with both.

4) This is where we see an opportunity too. We see new OW legislation as an opportunity to deal in a legal harmonized way at European level with uncredited works on the internet.

The main issue for picture libraries is not what happens about Orphan Works in picture library files, but what happens when images from picture libraries become orphans in both the digital and analogue environments due to lack of crediting and stripping of metadata. Those images which were not orphans previously are made orphans illegally, despite the best efforts of the rights holders. These issues must be addressed in any future legislation, also to prevent more images becoming orphans.

We need more respect for moral rights on the internet, not less.

We will now look into solutions :

What we need

What we do not want

What we prefer

SOLUTIONS

I. What we need

(1) Strict Definitions

A clear definition of

- a) Orphan Works
- b) “diligent search” / which must be documented
- c) commercial usage

This follows on from the extensive work of the European Commission and its guidelines. It is imperative that the definitions are harmonized at EU level.

(2) An independent control on the application of these definitions

Self regulation would lead to abuses and a control by courts would be costly and come too late anyway since the works have been used.

(3) A clarification of what happens to the revenues generated, directly or indirectly, by a commercial exploitation.

(4) A **sectorial approach**: different treatment depending on the type / nature of the works.

II. What we do not want

This explains **why we do not want** an additional mandatory exception to copyright or any extension to the exceptions already set by the Info Soc Directive Art 5. We also oppose any interpretation of any of the existing exceptions to this purpose.

Once introduced into copyright law, exceptions are irreversible. A blanket exception makes no difference between:

- ✓ The types of the works: books, films and pictures are treated in the same way.

This means that the exception would affect copyright owners differently according to the type of works.

- ✓ The types of usages: strictly non-commercial usages and commercial usages are not clearly identified.
- ✓ Only a court may determine whether the exception was applied in a right way – i.e. after the use of the work.

III. What we prefer

We would advocate a solution based around the idea of a **clearing center for rights issuing limited licenses**. This might be the copyright board, as in Canada, the patent office, as in the recent law in Hungary, or collecting societies, as put forward by countries like Germany and France.

France, in particular, has worked out a proposition especially tailored to meet the needs of the photographic industry struggling against “DR”.

As advocates of direct licensing over collective management of rights, of a competitive market place and of low cost management, we are aware of the costs and the responsibility involved in such a solution.

However, under the present circumstances, the advantages more than outweigh the disadvantages. This is the only way to avoid self-regulation and to manage the rights in a fair way.

This clearing center would have:

- * The resources
- and
- * The independence
- to control
- * The definition of the search, commercial usage, Orphan Works
- * The usage of the revenues in cases of a commercial use.

Different models can be discussed, including but not limited to a new international registry for Orphan Works. Again, however, we would wish for an entity for pictures only. Existing collecting societies may be in a position to propose alternatives. Even picture agencies, however, act as smaller collecting societies. Being specialist in their subject field and having built up huge databases over the years, as well as relying on extended international networks, picture agencies are indeed very well placed to track down and identify rights' owners for direct payment.

There are many questions to be answered such as:

- Which bodies may be entitled to act on behalf of the “lost” authors?
- How will the costs to administer this be managed?
- What rights to Orphan Works should be granted? How will the price be determined?

We see that there are many ways to set up such a scheme that beget many unanswered questions. If the Commission chooses this way, CEPIC would be delighted to contribute to the shaping of such a scheme.

Thank you for your attention.

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CEPIC, the Coordination of European Picture Agencies, is an international federation of picture agencies & libraries.

CEPIC's membership includes over 1,000 large and smaller stock photo libraries, major news agencies, art galleries and museums in 19 European countries. These Picture agencies & libraries produce content, as copyright holders, collect and distribute rights on behalf of the photographers they represent, their agents abroad, and finally market this creative material at home and all over the world through a professional network for publications on-line, in advertising, in magazines and in book publishing, as book covers or as illustrations within the books.