

# **Orphan Works The Wrong Problem – ECL the Right Solution?**

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# Orphan Works The Wrong Problem – ECL the Right Solution?

- How did it come that COM proposed an Orphan Works Directive which cannot achieve its primary objectives – Mass Digitisation / Mass Usage?
- Why have many other countries focused on Orphan Works instead of trying to find the solution to how to enable mass usage of copyright protected works in library corpus etc?

# Practice at Libraries:

- Researchers and students are in need of content / information.
- Library focus to facilitate study & research - need an instrument to make mass usage possible.
- To clear rights on an individual basis work for work, rights holder by rights holder is not only unpractical when it comes to Mass Usage - **it is impossible!**

# Copyright at Libraries

- Hence a library will need a collective licence.
- Collective Management Organisation (CMO) /  
Reproduction Organisations (RRO) can provide  
such a licence.
- The problem from a copyright perspective is what  
has been referred to as the Outsiders,
  - i.e. non members of CMO/RRO
  - as well as Orphan Works.

# **OW problem from a user perspective**

## **– does it require a specific solution**

- Is an OW a different kind of copyright protected work?
- **No!**
- Does Libraries / Researchers / Students have a special need for OW?
- **No!**

# **OW problem from a user perspective**

## **– does it require a specific solution**

- Have OW:s always been a problem?
  - As far as the secondary market such as for photocopying for educational purposes the problem has been obvious:
    - Old works to be used for study and research hence more likely to find OW
    - But since the user could rely on fair use, fair dealing or an exception / limitation less of a problem if any.

# **OW problem from a user perspective – does it require a specific solution?**

- In the Nordic countries photocopying agreements have been extended by law to include non members.
- In other countries such as UK such licensing agreements have been provided but the extended effect not underpinned by law – Copyright infringement / Risk management

# So why focus on OW?

- What triggered it was the mass digitization projects of Google and the EU project Europeana.
- The focus contradicted by the practise to provide a licence – underpinned or not by legislation – to be extended to non members of an RRO.
- So why has much focus been on OW?



# Why focus on OW?

- Libraries argued 40% of more of their collections OW – the remedy an exception.
- Rights holders / CMO / RRO protecting their legitimate interest.
- But OW may be right holders who can be identified but who are not members of a CMO - Outsiders

# Why did COM introduce a Directive which can not achieve it's primary objective?

- Since Europeana is "One Access Point" - cross border access is a goal itself.
- In the assessment report on OW in 2010 more than one solution was outlined, e.g. ECL.
  - Enables mass digitization,
  - Solves the OW problem.
- But since the acid test was cross border access ECL was not an option for COM.

# Orphan Works The Wrong Problem – ECL the Right Solution!

- Even though cross border access has been the focus for COM.
- COM launched the Stakeholder Dialogue on Out of Commerce Works in 2010 – MoU signed 2011
- 2011 COM issued a recommendation MS introduce legislation to underpin the licensing solution outlined in the MoU
- The MoU has been transformed to MS legislation in France, Germany, UK and other MS.

# Summary/Conclusions

- An ECL:
  - Enable mass digitization and making available.
  - Provides legal certainty,
  - Encompass any and all kinds of works
  - Does not require administration on behalf of the library,
  - Enables Public Private Partnerships

# Summary/Conclusions

- The OW Directive:
  - does not enable mass digitization,
  - does not enable a Public Private Partnership,
  - does not encompass stand alone photographs
  - it is costly to perform - a diligent search - and
  - you could still be exposed to paying damages – royalties and to take down the work from the library website, i.e. does not provide legal certainty,
  - Is solely focused on OW – cross border access