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# How to deal with Orphan Works in the digital world?

NOTE





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**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

# **How to deal with Orphan Works in the digital world?**

## **NOTE**

### **Abstract**

Orphan works are a serious issue for digital libraries. The digitisation progress is slow and only brings out-of-copyright material to the Web. If there are exceptions to this rule, they are either disputed or they are highly time-consuming and therefore extremely expensive, because of the necessary rights clearance procedures that have to be worked through before digitisation. There are not too many existing solutions in the Member States. The best example is the extended collective licensing in the Nordic countries. Against this background, there is absolutely a need for a European-wide solution. Legal certainty across Europe is indeed required to provide a strong basis for libraries to digitise orphan works.

This document was requested by the European Parliament's Committee on Legal Affairs

## **AUTHOR(S)**

Ms Elisabeth NIGGEMANN  
Director General  
Die Deutsche Bibliothek  
Adickesallee 1  
60322 Frankfurt am Main  
Germany

## **RESPONSIBLE ADMINISTRATOR**

Ms Roberta PANIZZA  
Policy Department C - Citizens' Rights and Constitutional Affairs  
European Parliament  
B-1047 Brussels  
E-mail: [roberta.panizza@europarl.europa.eu](mailto:roberta.panizza@europarl.europa.eu)

## **LINGUISTIC VERSIONS**

Original: EN

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To contact the Policy Department or to subscribe to its newsletter please write to: [poldep-citizens@europarl.europa.eu](mailto:poldep-citizens@europarl.europa.eu)

Manuscript completed in November 2009.  
Brussels, © European Parliament, 2009.

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## LIST OF ABBREVIATIONS

- AAP** Association of American Publishers
- ARROW** Accessible Registries of Rights Information and Orphan Works towards Europeana
- CENL** Conference of European National Librarians
- DBV** Deutscher Bibliotheksverband
- DNB** Deutsche Nationalbibliothek
- TEL** The European Library
- UrhG** Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)
- VG Wort** Verwertungsgesellschaft Wort
- VLB** Verzeichnis Lieferbarer Bücher

## LIST OF FIGURES

### FIGURE 1

Proposal for rights clearance on orphan and out-of-print works

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## 1. INTRODUCTION

Thank you very much for inviting me to talk about orphan works in the digital world. Orphan works are a serious issue for digital libraries and I am happy to see your interest in our concerns.

When I say “our” or “we”, I mean those librarians, archivists and museum curators, who work together to create Europeana, the common access point to Europe’s cultural heritage in the digital environment. I have the honour of chairing the European Digital Library Foundation, which is the governing structure behind Europeana. Among its stakeholders is the Conference of European National Librarians, CENL, and I am also the chair of CENL. CENL created The European Library, the free service to the resources of the 48 national libraries of Europe in 35 languages. Europeana builds on the project management and technical expertise developed by The European Library.

But my interest in orphan works also originates directly from my “daytime” position as the Director General of the German National Library. The German National Library was founded only in 1912 and is a “pure” legal deposit library. My guess is that among our holdings, beginning more or less in 1913, more than 90 % are under copyright and among those the majority are orphan works, depending on the definition of “orphan work”.

Today’s users are already – and future users will be even more – used to finding everything on the internet. “If it’s not on the Web, it doesn’t exist at all” is their credo and especially librarians have already experienced the consequences of this attitude. What is on the Web is the material that is published and distributed in electronic form as born digital works by commercial publishers and other publishing bodies or individuals. What is also slowly getting on the Web is the digitised cultural heritage. The digitisation progress is slow because there is little extra money in cultural institutions for digitisation. There is Google of course, digitising big libraries. But all in all progress is slow and only brings out-of-copyright material to the Web. If there are exceptions to this rule, they are either disputed – as is the Google example – or they are highly time consuming and therefore extremely expensive, because of the necessary rights clearance procedures that have to be worked through before digitisation.

More often than not, the rights clearance is more expensive than the actual digitisation. And very often clearing the rights is even not possible – or at least not possible within an economically justifiable approach. For a mass digitisation approach the original rights holders or their heirs or other transferees are practically speaking unlocatable. This is, as we all know, where we begin to talk about orphan works. Depending on the definition of “orphan works” and depending on the practical meaning of “diligent search”, the percentage of expected orphan works among in-copyright works and the costs to prove that they really are orphan works will vary greatly. Variations in costs and in percentage are also significant depending on the country of origin of the work on the one side and depending on the cultural sector on the other side: rights clearance for books is different from rights clearance for music recordings, films or photographs, for instance, and some countries have a better infrastructure for rights clearance than others.

Taking all together, what we see is a “black hole of the 20<sup>th</sup> century” in digital libraries. There are the recent, born digital works, that are offered by publishers and domain specific

distributors or that can be found in repositories of research facilities and cultural institutions and there are the historical cultural heritage works, digitised from out-of copyright physical copies from the shelves and holdings of cultural institutions. Between these two worlds of content, there is a vast empty space that will lead to a digital amnesia of most works from the 20<sup>th</sup> century – if no action is taken to fill the “black hole”.

There are five action lines that should be followed:

1. There is a need for extra funding for digitisation of the enormous numbers of objects from the 20<sup>th</sup> century.
2. Rights clearance must be facilitated by building rights clearance platforms and workflows<sup>1</sup>.
3. The creation of finding aids for the physical items in the digital environment would be very useful. Enhancing the catalogues of libraries e.g. by creating digital surrogates instead of digitising the copyright protected work itself, can be seen as a first step. Tables of content, abstracts and various other “organisational” parts of the work itself are not protected by copyright and can be digitised to help users to decide whether a work is of interest and whether it is worth while to look for it in a library or a bookshop.
4. Search indices built from OCR-treated digital copies of works and short snippets for display would be excellent surrogates<sup>2</sup> - if copyright would allow this for in-copyright works. However, without the permission of the rights holders what we have at present, at least in some countries, is digitisation of in-copyright works for archival purposes but not for retrieval purposes in a digital environment.
5. But, most important, something has to be done about the orphan works. Orphan works are not creating any revenue for their rights holders, be it authors, illustrators, producers, publishers or others. They are not made use of – neither by their creators nor by potential users. They are hidden treasures of our recent past that need to be brought into the open, revitalised.

## 2. EXISTING SOLUTIONS IN THE MEMBER STATES

There are not too many existing solutions in the Member States.<sup>3</sup> The best example is the extended collective licensing in the Nordic countries where a collecting society may grant licenses on behalf of all authors. A very interesting model within this scope is the Norwegian bokhylla (bookshelf) project. A contract between the Norwegian National Library and Kopinor, a Norwegian organisation that represents rights holders from about 30 different interest organisations, be it authors, publishers, visual artists etc. made it possible for the Norwegian National Library to offer 50.000 copyright protected books in full text in

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<sup>1</sup> E.g. in the ARROW project: <http://www.arrow-net.eu/>

<sup>2</sup> In France the Bibliothèque nationale de France is experimenting together with French publishers to give access to copyrighted books via Gallica. On the Gallica website enhanced reference material like tables of contents, covers and abstracts can be accessed and there is also a free browsing offer of sample pages of the publications. For access to the complete texts the users are referred to the website of an e-book distributor. In Spain the approach is very similar to the French and a great variety of publishers could be involved.

<sup>3</sup> The i2010: Digital Libraries. High Level Expert Group – Copyright Subgroup: Final Report gives examples of existing solutions.

the Web for Norwegian users.<sup>4</sup> In Hungary, the Canadian model is followed where a state agency can grant a license.

In most European copyright regimes however, there is no way that a third party instead of the rights holder can grant a licence. Changing the copyright law is therefore essential for these countries. But this will take time. What should be done in the meantime is to gain experience and to find out about what elements are needed in a workable solution.

Finding out and gaining experience but also getting orphan works into the Web are the aims of a German project that deals with orphan works slightly outside the copyright regulations, but still as near to copyright as it can get. Because there are hardly any existing solutions in the Member States and because the problem of orphan works is so essential I will present this project here.

### **3. THE GERMAN PROJECT**

In Germany stakeholders are on their way to finalise an interim solution for the digitisation of books that are orphan works. It is an interim solution because only a change in the German copyright can lead to a final solution. Therefore, the stakeholders agreed that a legal solution has to be found in the end, but for the time being they believe that it is necessary to find a fair way to deal with orphan books. I would like to present it here although it is not yet official because it might also have a model character for other European countries and for other media than books as well.

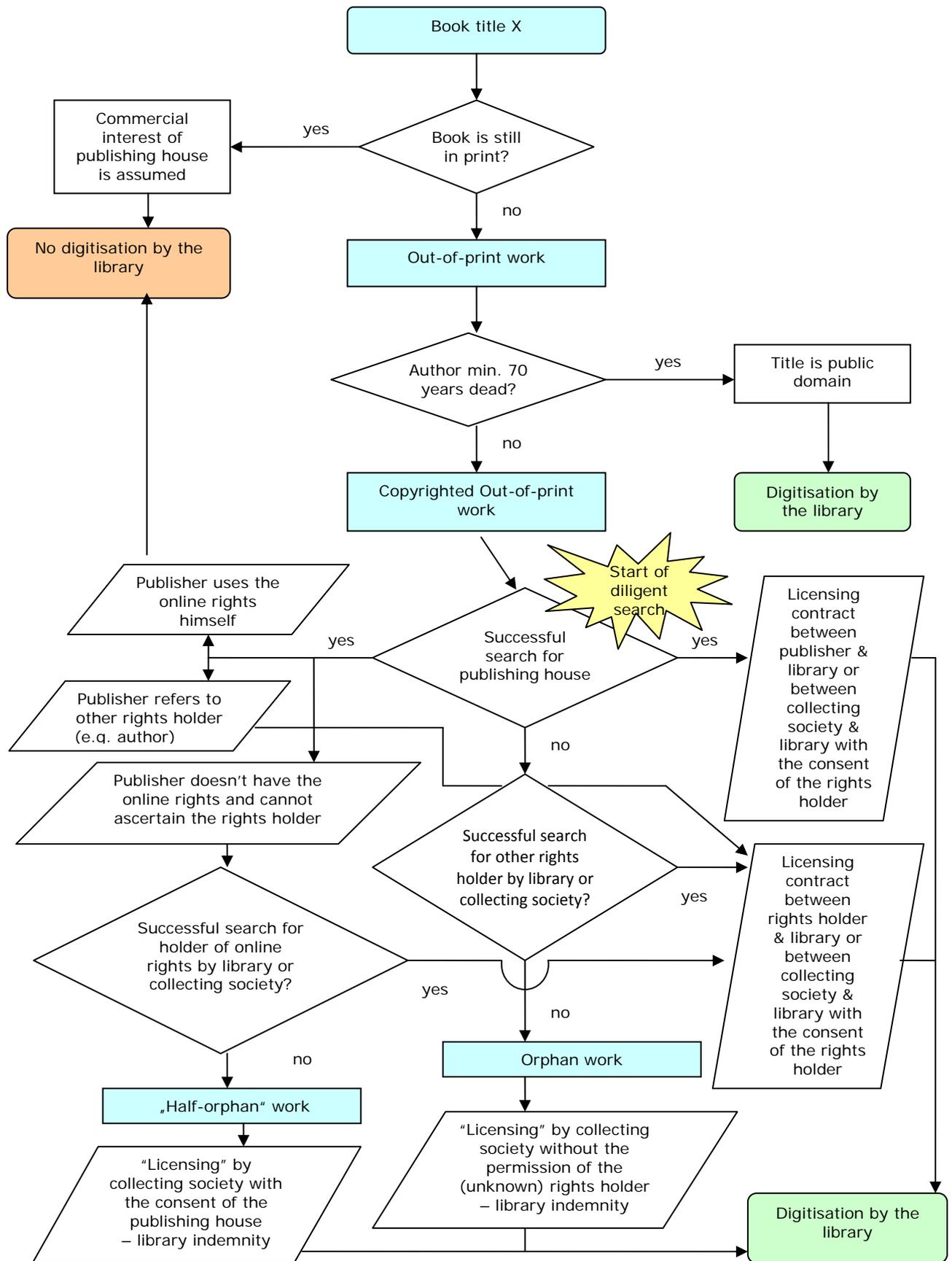
The Digital Libraries Working Group of the German Literature Conference (Deutsche Literaturkonferenz), where representatives of authors, publishers, libraries and collecting societies work together, is the framework where the German Libraries Association (DBV, Deutscher Bibliotheksverband), the German National Library (DNB, Deutsche Nationalbibliothek), the German Publishers Association (Börsenverein des Deutschen Buchhandels) and the German Collecting Society Wort (VG Wort, Verwertungsgesellschaft Wort) are involved in a project on the digital use of orphan books.

The key elements of this project are a diligent search for the rights holders, the involvement of the publishers in the search, the indemnification of the library by VG Wort and an escrow fee paid by the library to VG Wort. The following diagram gives a summary of the whole picture of rights clearance, but only the parts that deal with orphan works and "half-orphan" works is of interest within the context of this workshop.

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<sup>4</sup> A similar project is under way in Poland where about 200.000 books and journals under copyright will be digitised and made available online by the National Library of Poland restricted to the Polish territory and to one usage per time.

**Figure 1: Proposal for rights clearance on orphan and out-of-print works**



Source: Deutsche Nationalbibliothek / VG Wort / Börsenverein des Deutschen Buchhandels

Consensus could be reached for the following process for orphan books: Whenever a library wants to digitise a book, it has to determine first whether it is still in print. In Germany this is relatively easy because the German Books-in-Print database (VLB, Verzeichnis Lieferbarer Bücher) is quite comprehensive. If it is out of print, the library determines if the book is in the public domain or still under copyright. There is a list of reference works that have to be consulted. If the book is still in copyright, the next step is to find the publisher. There is a second list of reference works that have to be consulted for this. If the publisher cannot be found, the library looks for other rights holders. Again there is a list of reference works to be consulted. If the search is not successful, the library contacts VG Wort. VG Wort checks its database. If this is not successful, the book is an orphan work by consensual definition. The VG Wort, however, cannot licence the book according to German copyright law. Instead there is indemnification of the library by VG Wort against possible claims by reappearing rights holders, and the library pays a fee that goes into an account from which eventually claims are paid. The Members' Meeting of VG Wort approved this process in May 2008.

A second, similar process for "half-orphans" is still under discussion. If within the diligent search of the first scenario the publisher is found but does not have the rights for digitisation and does not know where to find the rights holders, and the library does not find them either, the process necessarily stops. This will regularly happen with books published in Germany before 1966<sup>5</sup>. The publisher will normally not have the rights for digital distribution. But as he has the rights for printing, the project partners agreed that the book would then qualify as a half-orphan and not as an orphan work. The question of remuneration is seen different in these cases and no agreement has yet been reached. Still, the parties involved are optimistic that a consensus can be reached even within this year.

Still, legislation is needed! Everybody agrees that the project is valid, nevertheless, because it will help to identify problems, needs and facts for rights clearance measures. One need has been obvious from the very beginning: the need for a rights clearance portal. As some of the partners are also working together in the ARROW project<sup>6</sup>, planning is under way to build a national portal connected to the solution aimed at within ARROW.

## **4. WHAT ELEMENTS ARE NEEDED IN A WORKABLE SOLUTION?**

In my experience from many discussions with different stakeholders, there are at least four elements that are needed for a workable solution.

1. A due diligence search is essential. However, as orphan works only exist in reality but not in theory, concrete examples and practical definitions are needed. In theory there is always a rights holder that can be found. Even in case of death without a natural heir there are always provisions. Therefore the concept of orphan works is prone to interpretation and to subjectivity. The question of how much effort should be invested to find the rights holders will therefore always be answered differently, depending on who is asked, those who represent the rights holders or those who represent the cultural institutions who want to digitise. To avoid misunderstanding and therefore insecurity for all parties involved, there have to be clear and practical

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<sup>5</sup> According to regulations made in the German copyright law, see § 137I UrhG

<sup>6</sup> <http://www.arrow-net.eu/>

definitions of “orphan works” and “diligent search” for every country and for every cultural domain.

2. An essential element to any valid solution is the creation of a legal certainty that does not stop at the national border of the digitising cultural institution. Europeana can only function if a rights clearance process in one country is valid also in all the other countries, as the i2010: Digital Libraries. High Level Expert Group – Copyright Subgroup stated in its Final Report.
3. Technical tools and databases are needed, that help to save time and money when doing diligent search and that prevent duplicate efforts.
4. A “soft” element needed is the willingness of all stakeholders to work together. It is therefore essential that consensus is reached for every solution.

## **5. IS THERE A NEED FOR A EUROPEAN-WIDE SOLUTION AND HOW TO ACHIEVE IT?**

There is absolutely a need for a European-wide solution. A European-wide solution is actually only a first step. Digital libraries within national or even EU-borders are not realistic because there will always be ways to get access across borders within the Web.

Instead or paraphrasing I would like to quote the i2010: Digital Libraries. High Level Expert Group – Copyright Subgroup who stated in its Final Report: “Clarification and transparency in the copyright status is an important element in the European Digital Library initiative. Cultural institutions need adequate certainty in dealing with orphan works ... Comprehensive, large scale digitisation and online accessibility could be greatly hampered, if adequate solutions are not found to the problem of orphan works. ... the Copyright Subgroup emphasised the need for interoperability and introduced the concept of mutual recognition of national solutions ...” A way to achieve a cross-border effect would be “that all Member States have solutions which are interoperable and agree to mutually recognise any mechanism that fulfils the generally accepted core principles.”

## **6. IS A REGULATORY INTERVENTION NECESSARY?**

Copyright laws in the Member States are far from unified. From the point of view of Europeana, harmonisation is badly needed – if not a European Copyright Law.

Legal certainty across Europe is required to provide a strong basis for libraries to digitise orphan works. It is necessary to introduce clarity around the digital nature of library exceptions. In order to achieve legal certainty for all stakeholders, these exceptions must be legally binding in all Member States.

The pending settlement between Google and the AAP clearly shows what kind of situation can arise: Large quantities of out-of-print works of European origin that are in-copyright in the EU, but out-of-copyright in the US<sup>7</sup>, are being digitised and made available in the US

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<sup>7</sup> Pre 1923 material in the US is in the public domain whereas in the European Union some works from the 1860s are still in copyright.

only. Such an imbalance in access to historical and cultural information needs to be urgently addressed by the EU, in part, through exceptions to copyright law.

At this point I would like to quote from the CENL statement on the Green Paper – Copyright in the Knowledge Economy (2008):

“Clarification in law is the role of the legislator and should not be left to interested parties to negotiate as it is the prime role of government to arbitrate where the balance in copyright should lie. Only legislation can guarantee that the interests of the creator are balanced with the public interest, for the good of wider society. It is not acceptable that vital issues such as the flow of knowledge in the information society are simply left to the vagaries of soft law or private negotiation.”

“... the role of limitations and exceptions, and therefore the public interest itself is being severely undermined in the digital age by the “over-rideability” of copyright law by contract law.<sup>8</sup>”

“ the non-mandatory nature of the exceptions in the Copyright Directive (has created) the patchwork quilt of permitted acts across Europe ... There is an integral link between limitations and exceptions and fundamental human rights as expressed in the United Nation’s Universal Declaration of Human Rights. The declaration guarantees equality, the right to education, freedom of expression and the right to access culture and share in scientific advancement.”

“These questions relate to the role of libraries in the digital world. ... as repositories of human knowledge, in a society where information is becoming synonymous with economic growth, the role of libraries in the digital world must be strongly supported. Given the large public financial investment in libraries, it is not acceptable that the role of a library as the prime source of aggregated scholarly information is undermined by incomplete and piecemeal legislation.”

With respect to orphan works, CENL’s recommendation was: “Legal certainty across Europe is required to provide a strong basis for libraries to digitise Orphan Works.”

And, to end on a personal note, I think that a modern copyright framework which applies to the new digital world is urgently needed. It is crucial that this modern framework considers the different demands of each stakeholder. To start with orphan works and the need of bringing them out of the “dark” into the open, of making them available to a wide public via the Web, would be an excellent beginning.

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<sup>8</sup> Of 100 contracts analysed by the British Library over 90% undermined limitations and exceptions. <http://www.bl.uk/ip/pdf/ipmatrix.pdf>



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