



Orphan works

Large-scale initiatives to digitise the collections of libraries have raised the problem of rights related to "orphan works" - those for which rights-holders cannot be identified or found. The Commission has proposed a Directive which seeks to find a balance between protecting potential rights-holders and facilitating certain uses of orphan works in the internal market.

Background

In 2004, Google [announced](#) its intention to scan millions of books and make them searchable online. The subsequent lawsuit by the Authors Guild and the later failure of a settlement illustrated the complicated copyright issues raised at global level by mass digitisation. Depending on the [definition](#), the number of "orphan works" ranges from hundreds of thousands to millions, and is very [difficult to determine](#). While some EU Member States already have a regime in place, the Commission's [proposal](#) aims for an EU-wide solution. (The main points are detailed in an August 2011 [Library Briefing](#)).

National regimes

[Member State regimes](#) on orphan works vary from [Extended Collective Licensing](#) (Sweden, Denmark, Finland), [mixed systems](#) including non-exclusive licences (Hungary), to licensing [proposals](#) including the commercial use of orphan works (UK). In [Canada](#), the copyright board has decided in over [260](#) cases concerning unlocatable copyright owners to issue licences since 1990. In the US, legislation has long been [under discussion](#) but Congress has so far not agreed any text.

Proposed solutions from academics range from the application of [existing models](#) to [international solutions](#) going beyond the EU. Some US scholars promote the [application of the US fair use doctrine on orphan works](#) for certain uses instead of copyright-specific legislation; others call for [open access](#), combined with injunctive relief for rights-holders.

An EU solution

The proposal falls under the [i2020 strategy](#) which comprises the [Digital Agenda](#) including the mass-

digitisation project [Europeana](#) as well as its follow-up [Arrow project](#) on rights information. A Commission [Recommendation](#) of 28 November 2011 as well as [Council conclusions on digitisation](#) of 10-11 May 2012 emphasise the importance of the Europeana project and the need for a rapid solution for orphan works.

The Committee on Legal Affairs voted on its [first reading report](#) on the proposed Directive (rapporteur Lidia Geringer de Oedenberg, S&D, Poland) in March 2012. In trilogue on 6 June 2012 an informal [compromise text](#) was adopted. The main outcomes are:

- coverage of a broader range of works: phonograms, unpublished works and partial orphans; reference to embedded works; recital on [out-of-commerce works](#)
- inclusion of audio heritage institutions as users (besides other institutional users)
- removal of the tie of specific uses to specific institutional users
- additional requirement of good faith when carrying out a diligent search
- institutional users can generate revenues from orphan works to cover their costs related to digitisation
- Member States are required to provide for fair compensation not only for future but also for past use of the works to rights-holders who reappear after reproduction of the work.

Stakeholders

[Knowledge Ecology International](#) criticises the limitations of the compromise to very specific uses and users and considers that certain national systems provide more flexible solutions. [Information sans Frontières](#) states that an exclusion of commercial use would make partly private funding impossible.

[Communia](#) points out that the limitation to formal institutional users excludes individual end-users and non-profit initiatives like Wikipedia. Public-private partnerships would not be stimulated because private organisations could not make the works available themselves. In addition, the increased liability would lead institutional users to fear legal consequences.