

## Response Submitted by the British Library

### Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT

As probably the largest research library in the European Union, the Library knows well the importance of copyright as a tool to manage and control the flow of scholarly information to create a well-educated and democratic society. The Library has direct, and a probably unique, experience of the information ecology. It is not only a legal deposit library, purchaser of content<sup>1</sup>, and licensee from publishers and collecting societies but also a publisher of databases, CDs and books, clearer of rights, licensor of IPR and exerciser of exceptions in law. We also support the creative industries through the Business and Intellectual Property Centre which is the largest resource of business information in the UK and it also runs popular training courses on intellectual property for business people.<sup>2</sup>

The British Library welcomes the opportunity to comment on the European Commission's reflection document: *Creative Content in a European Digital Single Market: Challenges for the Future*.

#### 5. Possible EU Actions for a Single Market for Creative Content Online

The statement by the Commission that 'community rules have harmonised the scope and tenor of the exclusive rights without, however, providing clear boundaries for these rights by means of uniform exceptions' is of particular importance for the future of the European information society and to be welcomed.

Limitations and exceptions perform the following roles, and therefore form a fundamental pillar of a democratic civil society:

1. Support the judicial and legislative process. (Judicial / legislative exceptions).
2. Support a free press. (News reporting exceptions).
3. Support a well-educated and creative society. (Non-commercial scientific research and educational exceptions etc).
4. Support a vibrant culture. (Library exceptions).
5. Address issues of market failure. (Non-commercial scientific research, visually-impaired exceptions, educational exceptions etc).
6. Support an egalitarian society. (Exceptions for the visually impaired, fair dealing etc).

Exceptions are extremely important for education, research and learning. They provide clarity to users of copyright works and therefore the prospect of further harmonisation of exceptions, to form at a European level a "lowest threshold", is to be welcomed.

##### 5.1. Consumer Access - Orphan Works

The issue of orphan works – a copyright work whose owner is unknown or untraceable – is also a fundamental one for any digitisation project. Estimations by the British Library based on studies of library and archive collections have shown it would not be inappropriate to suggest that over 40% of all copyright works may be

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<sup>1</sup> In 2008/9 the British Library's acquisition budget was £18.1 million.

<sup>2</sup> <http://www.bl.uk/bipc/devbusiness.html>

orphaned works<sup>3</sup>. The clearance of rights can be a time consuming and expensive activity even where it is clear who the rights-holders are. Any party who is looking to digitise material that potentially includes orphan works not only has to go through a 'due diligence' process of identifying possible copyright owners, they are also exposed to risk of infringing copyright if they are unable to trace these owners and subsequently reproduce the material.

Libraries, archives and museums have to make difficult choices regarding what information to digitise and make available. The effect of the complexities of rights clearance combined with the uncertainties around orphan works has meant that most libraries and archives have focussed to date on material that is clearly out of copyright. This has led to the "black hole of the twentieth century" where cultural organisations have avoided digitising in-copyright material, and retrodigitisation of pre "born-digital" material is generally limited to certain high profit-margin areas of publishing such as scientific journals.

It is clear that an international solution is required for the orphan works problem as the realities of today's connected world are not subject to traditional physical or linguistic boundaries.

One solution is to extend collective licensing arrangements within each territory so that fees for digitisation can be paid and held for owners of rights following successful search. However there are issues surrounding whether these solutions could be undermined by opposition from individual rights holders<sup>4</sup> as we see in the Google Book Settlement. There are also equally problematic issues of the complexity of cross-border licensing. Licensing creates a complex web of permitted activities, obligations and specific restricted activities that reflect geographic and linguistic boundaries in addition to analogue market segmentation and traditional business models in each member state. Without comprehensive pan-European legislation, even if there was just one collecting society per member state (which is not the case of course) this would mean across the EU 279 reciprocal cross-border licences. The Commission has to consider whether this is possible let alone cost effective.

Any pan European collective licensing solution should also aim to create a level playing field for users of orphan works, and as part of this ensure that fundamental concepts such as "digital", "research", "non-commercial" etc are uniform across Europe. Without this we risk creating a patchwork quilt of differing terms and conditions for using orphan works that simply reflect local analogue practices and traditions. How such a level playing field will be monitored and collecting societies appropriately regulated in regards to the use of orphan works internationally across the web is just one question of many for the Commission to consider.

Another issue is that cultural organisations are also concerned that a collective licensing solution for orphan works may mean the inappropriate commercialisation of cultural content. The In From the Cold report by the Strategic Content Alliance makes the point that the majority of material that sits within cultural organisations were never created with commercial intent in mind, and therefore by implication that when redigitised, should also not be commercialised.<sup>5</sup> Many of the projects embarked upon by national libraries reflect the wide and research orientated nature of their

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<sup>3</sup> British Library response to Gowers Review December 2007 <http://www.bl.uk/ip/pdf/ipgowers.pdf>

<sup>4</sup> The Berne Convention allows for rightsholders in one country to represent those in another. However, the lack of European / international representativeness of the Book Rights Registry has been one of the main arguments against the proposed Google book settlement.

<sup>5</sup> JISC, In from the Cold, An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

collections<sup>6</sup> and often have little commercial value. The British Library, for example, has found that the majority of creators, when approached directly do not want to receive fees for the reuse of their material as creators appreciate the value of public access to content for the purposes of teaching and research. As a publicly funded cultural organisation it is important that we not only obey copyright laws, but that we also are able to reflect in our activities the wishes of the creators of the content we curate and seek to digitise. It is therefore important that cultural organisations do not find themselves alienating or sitting awkwardly between the wishes of the originating communities that culturally “represent” the orphan works and value access to their own community’s content, and the business imperatives of a collecting society wishing to charge for the same material.

We believe that any solution for orphan works should reflect the following principles:

1. Legal and reputational certainty, and exemption from liabilities, for users of orphan works that have followed the appropriate legal mechanisms.
2. The issue of orphan works is not an issue for the EU in isolation and therefore any solution must reflect the global nature of content held in European libraries, and the global nature of access to content on the world wide web.
3. In order to respect the will of the creator or author, any solution must make a distinction between works originally produced with commercial intent in mind, and those that were not. In terms of reuse any solution should also be able to differentiate between commercial and non-commercial reuse – particularly in the field of education and research.

Given the legal, contractual, cultural and moral complexities that exist around the potential reuse of orphan works it would appear that no one system can cater for the many different factors that need to be considered when considering digitising historical material as diverse as a personal letters, photographs or films, unpublished oral history interviews, grey literature<sup>7</sup> or commercially produced books and films.

The UK government, recognising the fact that a “one size fits all” solution is unlikely to work, has proposed a system that introduces choice and flexibility into the reuse of orphan works. It is envisaged that a cultural organisation will be able to either apply for a licence from a collecting society or similar organisation, or apply directly to the Secretary of State. By providing choice the government has addressed the core issue of reputational certainty for cultural sector organisations. For material that was produced with commercial intent in mind a collecting society that represents that category of work would appear to be a highly appropriate solution, particularly given that a licence for in-copyright works for a digitisation programme may well be forthcoming from the same organisation. (Though of course the mandate for digitisation of in-copyright works may or may not sit within the remit of a particular collecting society.) However as highlighted above much non-commercial material, often private or unpublished that a library or museum has curated for decades, is probably less the remit of a commercial entity than the individual, family or community from where the work originally came. e.g. Much recorded traditional

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<sup>6</sup> The online offerings that form part of the British Library Archival Sound Recordings include subjects as diverse as: Survey of English Dialects, Early Spoken Word Recordings, Institute of Contemporary Art talks, Classical Music, British Wildlife Recordings, Oral History of Jazz in the Britain, English Traditional Music, Unpublished collections from South Africa, Botswana, Senegal etc,

<sup>7</sup> Grey literature refers to material that is not easily accessible through conventional channels such as publishers. e.g. Ephemera, scientific and governmental papers, conference proceedings etc.

music. It is also entirely plausible that the cultural sector body may well know far more about the works, and their creators, than the any collecting society does.

Given this the Commission should explore, as the UK government has done, the provision of a multi-faceted orphan works solution that deals appropriately with the reuse of vastly different types of material for vastly different uses. Such a solution could provide for the co-existence within law of an exception (subject to “reasonable investigation” for rightsholders) as well as a licensing based solution, or as we see in the UK a governmental licence. It would be the responsibility of the digitising organisation to decide which, or for which project what combination of solutions, is appropriate. Such a nuanced response to the orphan works issue would perhaps be the best solution to an issue that has such a vast array of cultural, moral, commercial and educational angles to it.

Two further issues not addressed by the reflection paper include:

### **The importance of non-commercial players**

The paper outlines the groups in the value chain (section 4) to be consumers, commercial users, and rightholders. As the Green Paper “Copyright in the Knowledge Economy” highlights there are many important copyright stakeholders that fall outside these definitions. Namely scholars, researchers, academic authors as well as cultural and educational institutions. New roles and opportunities are afforded to *all* players in the digital age as technology has changed and therefore any comprehensive evaluation of the European legislative framework, given the importance of education and research to the knowledge economy, must reflect the needs of all stakeholders.

### **Copyright Law overridden by Individual Contract**

Libraries across the EU in 2007 alone spent over €4.25 billion on content acquisition and legal certainty as to how this material may be used can only be created efficiently and fairly through copyright law.<sup>8</sup> While the Database Directive does not allow the undermining of limitations and exceptions by private contract, in regards to copyright law, other than Ireland, Portugal and Belgium, this is not the case in the rest of the European Union. It is also interesting to note that other countries outside the European Union such as Brasil for example do not allow the undermining of copyright law by private contract. Evidence presented in previous British Library submissions empirically demonstrate that contracts, that are impractical for libraries to negotiate in any volume given the size of digital collections, are systematically undermining copyright law and the exceptions therein. Of 100 contracts offered to the British Library well over 90% undermined exceptions in law.<sup>9</sup>

Inevitably each and every contract supplied with electronic content provides differing user terms and conditions. Given the vast amount of electronic publications that come with contract, it is virtually impossible for a library to intermediate copyright compliant access to digital content on a digital object by digital object basis. Given the importance of education and research, and that the need to copy is integral to the educational process, it is important that clear and easy rules around copying and reusing copyright information are established. For this reason the library community

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<sup>8</sup> 2008 Library Market Size, Share and Forecast Report; Outsell Market Intelligence Survey Report.

<sup>9</sup> <http://www.bl.uk/ip/pdf/ipmatrix.pdf>

believes the “uniformity” and familiarity around access to knowledge as provided for by existing copyright law is as appropriate to the digital age as to the analogue one.

Any questions on this submission should be forwarded to : [ben.white@bl.uk](mailto:ben.white@bl.uk)

The British Library, 96 Euston Road, London, NW1 2DB.