

DR KARIN LUDEWIG¹

Whither the Orphan Works? Maintaining of and ensuring sustainable access to Europe's cultural heritage².

The accessibility of the common cultural heritage of any society to all its members is inherently important for the education of the population, for everybody's ability to participate in political decision making processes and hence for the general prosperity of society. Therefore, the European Union is keen to set up a Digital Library, which is called *Europeana*, and which is meant to present the European cultural heritage to the world. It is not only a library, but a digital pool of cultural content of all sorts: text, video, audio and visual files from museums, archives, libraries and art galleries. One of the main challenges, however, in making the European cultural heritage available online is copyright. In the special case of the 'orphan works' it is impossible to legally digitize and make available online cultural and scientific works. In an attempt to solve this problem, the EU legislator published a "Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works" in May 2011. The new directive will make it compulsory for all EU Member States to find legal solutions for orphan works and mutually recognize each other's solutions. Despite being widely criticised for missing certain categories of work out, e.g. documentary photographs, and for not providing any useful solution for mass digitisation projects, the proposal constitutes a great step forward with regard to the presentation and preservation of Europe's cultural heritage to the general public.

Ladies and Gentlemen!

Europe's cultural heritage is held in collections of libraries, archives, museums, art galleries, film heritage institutions etc. In times of peace and in democratic societies, this cultural heritage has always been accessible to the public: the citizens of Europe were allowed to enter these premises and read the books, search the files and look at the objects of history, art history and natural history. The accessibility of the common cultural heritage of any society to all its members is inherently important for the

¹ European Network for Copyright in Support of Education and Science

² The article is based on the presentation given by the author in the international conference on Sustainability and Maintenance (International Partner Days) organised by the Budapest Business School on Nov. 9. 2011. Budapest.

Az előadás a BGF Külkereskedelmi Kar által szervezett „Conference on Sustainability and Maintenance” c. konferencián hangzott el 2011. nov. 9-én.

education of the population, for everybody's ability to participate in political decision making processes and hence for the general prosperity of society.

The last century has brought about important technical innovation: With the possibility of digitising information and spreading it world-wide in the blink of an eye has arisen the idea of making mankind's cultural heritage available to everyone at any time from any place on the internet and preserving it in digital form for future generations. Hereby our cultural heritage would show in a new light and give rise to a lot of new insights and knowledge, as not only the singular works but also their diverse and multifaceted connections across time and space would become observable in a hitherto not perceived way.

Libraries were the first to publish their catalogues on the internet; later on some of them also started to digitise some of their collections in order to make them accessible directly on the internet without any need for the user to go to the library building any more. Museums had in mind putting images of their objects online, too. The internet started to resemble a haystack, in which it was nearly impossible to find any particular needle.

Information scientists, the archivists of the 20th and 21st centuries, are still exploring the possibilities of the internet as a common huge world-wide general store of all cultural heritage and information, accessible to everyone. Preservation technology has advanced but not yet solved all problems of making digitised papers or visual or audio-files enduring for all times; crawling and linking technologies for disparate data and databases are also advancing and allowing the setting up of 'Digital Libraries', which are not only libraries but digital pools of cultural content of all sorts: text, video, audio and visual files from museums, archives, libraries and art galleries.

Politically, it was the will of the European Union to set up such a Digital Library, and it was to be called *Europeana*. *Europeana* was meant as a European answer to *Google's* provocation of putting the world's library content online. It was also meant as an alternative to the threat – better: the fact, which was widely perceived as a threat –, that *Google* digitized texts without asking for the consent of the authors and other copyright holders before. *Europeana* was launched in 2008, „with the goal of making Europe's cultural and scientific heritage accessible to the public.”³ As of now, *Europeana* provides access to more than 19 million digital objects. According to its director, Jill Cousins, the European cultural heritage will be accessible via *Europeana* in its totality by 2025.

The German legislator also supports the mounting of a *German Digital Library*. It will launch in 2012 and should be the window for the world to the German national heritage of research, culture and arts. Its content will automatically feed into *Europeana*.

³ http://www.europeana.eu/portal/aboutus_background.html



One of the main challenges in putting the European cultural heritage online is copyright – copyright regulates the fact that before anyone who wants to make copies of protected works or make them publicly available online will have to ask for the consent of the authors, or rights holders, of such works. So in the beginning cultural heritage institutions like libraries or museums would digitize and make available online just the works which were in the public domain – i.e. works in which copyright has already ended. In the European Union copyright in a scientific, cultural or artistic work ends 70 years after the author's death – meanwhile, copyright stays with the rights holders to whom it has been assigned, or with the heirs of authors and rights holders. As *Europeana* was meant to be a strictly European alternative to Google its inventors and political fathers explicitly stated that compliance with copyright law would be of great importance to the operators of *Europeana*. Anyway, taking into account the life span of authors plus 70 years, a risk-less publication of our cultural heritage is possible for the institutions that hold them in their stocks only for works created in, say, round about the end of the 19th century, or earlier.

Any Digital Library such as *Europeana* therefore runs the risk of leaving a ‚black hole‘ of information society: it is the cultural heritage of the 20th century which paradoxically cannot be found on the web, enjoyed and built upon by contemporary creators.

You may object that this is just a matter of how many efforts the operators of *Europeana* or any other National Digital Library will put in the licensing of works in copyright. However, there is this special case of the ‚orphan works‘. Orphan works are works, the authors or rights holders of which are completely unknown or else their whereabouts cannot be sorted out. As a consequence of this it is literally impossible to digitize them and make them available online. Often even their sustainable maintenance and therefore their survival is threatened as copyright would not even allow heritage institutions to make the technically necessary amount of copies for format shifting or preservation.

Politicians and stakeholders have noticed the problem early and have been discussing it since about 2006, when the EU published a recommendation to all Member States to find (national) legal solutions to the problem.⁴ However, most Member States were reluctant to follow the recommendation. Hungary is one of the few Member States of the EU which has already developed an advanced and sustainable solution: similar to the Scandinavian countries, it has an extended collective licensing model in force. Hereby any licensing scheme negotiated between rights holders and collecting societies for a certain number of works can be extended to any other works of the

⁴ Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, L 326/28 of 31 August 2006, 2006/585/EC, http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/recommendation/en.pdf.

same sort, be their authors known or unknown. As this model does not work for the publication of a film on DVD or the new edition of a book, Hungary introduced a centrally-granted non-exclusive licensing model in 2008. A new article 57A⁵ was introduced into *Hungarian Copyright Act* in 2008 which would allow the *Hungarian Patent Office* to assign licenses for non-exclusive uses of orphan works, for not longer than 5 years, in the context of digitizing and making works publicly available. This model may prove rather helpful for dealing with the Hungarian cultural heritage in the information society in a sustainable way.⁶

The licensing of use of works of unknown authors or of authors with an unknown place of residence (orphan works)

Article 57/A

(1) The Hungarian Patent Office shall grant upon request a license in conjunction with the setting of a compensation that is to be in compliance with the mode and extent of the use to those who have taken measures that can generally be expected under the given circumstances for the search of the author with due consideration to the genre of work and mode of use and the search of the author was of no avail. The license shall be effective for a maximum term of five years, in the territory of Hungary, non-exclusive, non-transferable, and shall not grant authorisation for granting further licenses and for the alteration of the work (Article 29)

(2) If the use is not designed to earn or increase income even in an indirect manner, the compensation provided for in paragraph (1) shall be paid after the author or his place of residence becomes known. If the use is designed to earn or increase income even in an indirect manner, the compensation shall be deposited with the Hungarian Patent Office. The deposit of the compensation shall be the condition of the commencement of use.

(3) If the author or his place of residence becomes known during the term of the license the Hungarian Patent Office shall revoke the license upon the request of the author or the user with an effect commencing on the date when the

The EU legislator has recently – in May 2011 – published a “Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works”.⁷ The *Commission*, by proposing a stand-alone directive on the issue of orphan works, suggests to amend the hitherto untouched catalogue of exceptions to copyright listed in the Directive 2001/29/EC⁸; and, in my opinion, it thereby emphasises the importance of the issue.

The new directive will make it compulsory for all EU Member States to find legal solutions for orphan works. The sort of solution any Member State goes for is left to the will of the national legislator, provided the following general rules are observed:

⁵ Cf Vetulani, Agnieszka (2008), *The Problem of Orphan Works in the EU. An overview of legislative solutions and main actions in this field*. European Commission, DG Information Society and Media, Unit E4: Digital Libraries and Public Sector Information. February 2008; URL: [http://ec.europa.eu/information_society/activities/digital_libraries/doc/report_orphan_stagiaire_2/report_orphan_vetulani \(corrected version\) \(2\).pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/report_orphan_stagiaire_2/report_orphan_vetulani (corrected version) (2).pdf); last visited on 2nd November 2010; p 37.

⁶ Act No. LXXVI of 1999 on copyright (consolidated text as of 06.09. 2010), amended by Act CXII of 2008 on the amendment of the Copyright Act (orphan works, public lending remuneration, collective management: mechanical reproduction and general rules); articles 57/A – D: The licensing of use of works of unknown authors or of authors with an unknown place of residence (orphan works); http://www.artisjus.hu/english/copyright_act_hungary_101111.pdf

⁷ Brussels, 24 May 2011, COM(2011) 289 final; http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf

⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; L 167/10; <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

The directive allows for certain uses of orphan works by libraries, educational establishments, museums, archives, film heritage institutions and public service broadcasting organizations. Works which fall under the directive would be any written works, audiovisual works held in film heritage institutions and audiovisual or audio material produced by public broadcasters before 31 December 2002. Also included by the provisions are visual works such as illustrations or photographs which are imbedded in text works. In case an author or rights holder of such a work cannot be identified or found despite a diligent search on a work-by-work basis, this work shall be considered 'orphan'. Member States will mutually acknowledge any works identified as 'orphan' according to the rules of the country of its first publication. Without the need of compensation the heritage institutions will be allowed to make such works available online and to copy them for cultural and educational purposes. In case the heritage institutions want to use an orphan work for any other than the outlined purposes or in connection with a public-private partnership, remuneration will have to be provided for authors or rights holders who might step forward and claim rights in any orphan works. Such right holders may also put an end to uses made of their works within the framework of this directive.

In my opinion the new directive on orphan works should be improved with regard to necessities of mass digitization projects – it could for example allow for extended collective licenses; it should include all categories of works – also stand-alone documentary photographs; it should also allow for the use of unpublished material such as letters, manuscripts etc., held by archives.⁹ Anyway, despite these additional issues which should be taken care of before the coming into force of the directive, the proposal constitutes a great step forward with regard to the presentation and preservation of Europe's cultural heritage to the general public.

So where should the orphan works go? Should they, in the worst of cases, and in view of the empty public budgets, be exposed to decay and eternal loss? Should they stay in the visual and audiovisual archives, with their foster parents, who have been nourishing them for decades? There they might stay safely and well-estimated, but unknown to the public, in the depots. Should they be handed over to the collective societies which might become the new orphanages of the digital age?

I think we should strive to digitize them and make them available to the general public online – *Europeana* would then, in the name of sustainability and maintenance of our cultural heritage, be able to spread as much information about them as possible in the Open Linked Data Cloud and make them accessible for the present and for future generations.

Thank you very much!

⁹ Cf EBLIDA, LIBER and ENCES, Statement on the European Commission Proposal for a Draft Directive on Orphan Works. http://www.ences.eu/fileadmin/important_files/Documents/Directive-proposal_Orphan-Works_EBLIDA-LIBER-ENCES.pdf