

The Issue of 'Orphan' Works in Digital Libraries, Especially as Treated by the Directive 2012/28

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ABSTRACT

This paper analyzes the 'orphan' works problem of the digital libraries' perspective. 'Orphan' works, i.e. works of an unidentified -or unlocated- author, create a legal uncertainty, mostly affecting the large scale users in their mass digitization projects, that, although they need to use the works and they are willing to obtain a license, they are unable to do so, since they do not know from where to ask it. Aim of the paper is to explore the controversial situation that the 'orphan' works have created and the way that the legislation of the European Union law has decided to deal with this by adopting the Directive 2012/28. Part one will study why, how and when 'orphan' works entered into the modern copyright world. Part two will look through the problems that originate from 'orphan' works: economic, cultural, technical problems and the multi-territorial issue. Next, after analyzing the relevant legal framework for 'orphan' works in relation to digital libraries in part three and touching upon the legal solutions that exist -or are proposed- to confront this problem (part four), in part five it will be analyzed how the 'orphan' works are treated at the European level and the Directive 2012/28 will be presented. Finally, in the last part (part six) some tools to prevent the creation of future 'orphan' works will be mentioned.

Keywords: Anonymous Work(s), Copyright, Digital Libraries, Digitization, Diligent Search, Directive 2012/28, Exception, Formalities, Orphan Work(s), Unidentified Author(s)/Rightholder(s), Unlocated Author(s)/Rightholder(s), User(s)

1. INTRODUCTION

Different definitions of 'digital libraries' exist. Regardless from which one is chosen, no one could deny that: "*digital libraries are basically organised collections of digital content made available to the public. They can consist of material that has been digitised, such as digital*

copies of books and other 'physical' material from libraries and archives. Alternatively, they can be based on information originally produced in digital format" (European Commission, i2010: DIGITAL LIBRARIES, 2005 COM (2005) 465 Final, p. 3).

The main feature of digital libraries is the direct access to the content of a wide variety

DOI: 10.4018/ijdl.2012100102

of intellectual works, including text, audio, video and data. Due to the convenient, easy and extended access and due to the search capabilities, which are features that do not exist in traditional libraries, digital libraries have become ubiquitous during the last decade. Given that nowadays on the one hand, the access to information is a key factor for development and that on the other hand, the preservation of the cultural heritage through the digitization becomes really important, digital libraries have gained a high position in the prioritization of governments. The digitization efforts at both sides of the Atlantic (Europeana and Google Library Project) provide an indisputable evidence for this.

Thus, digitization of libraries' resources takes place primarily for two reasons: to preserve in the long-term their resources for future generations and to make their resources accessible to the public, using the possibilities offered by technology. Additionally, the digitization efforts appear to be driven by the public's desire to have access to knowledge and to occasionally rare and valuable collections of these institutions. The digitization of libraries' collections could provide the public with more in-depth and precise knowledge in vast subject areas by saving time and money and provide anybody for equal access to their collections without being necessary to visit their establishments (Thompson, 2006, p. 823). The World Wide Web has opened a gateway through which people may provide and receive a plethora of data and works. With the use of internet, digital libraries can be a part of a global educational network.

Current copyright law, however, does not provide a clear guidance about the possible legal ways to deal with digitization, preservation copies and their availability to the public. Applying present copyright law principles to digital collation and preservation processes sometimes thwarts rather than forwards these efforts, as it will be analyzed below. One of those issues that have a deterrent effect is the 'orphan' works issue.

Libraries (and the same applies for archives and museums) maintain huge collections of works (literary, audiovisual, works of fine and visual art, postcards, brochures, pamphlets, musical etc.), few of which have any indication of who the author is. Most of the times, these institutions acquire their works by donation and the donors rarely have information about the copyright status of the tangible medium they donate. That means that these institutions own only the tangible medium of the work and not the copyright on them. 'Orphan' works, the works of an unidentified -or unlocated- author, create an uncertainty to the perspective users, who, although they need to use the works and they are willing to obtain a license, they are unable to do so, since they do not know from where to ask it. If it is impossible to locate the rightholder, it is impossible to ask for permission to undertake any act that belongs to the exclusive rights of the author or the rightholder. That means that any such activity from the potential user regarding an 'orphan' work would be illegal and would violate the rights of the author or the rightholder. Therefore the 'orphans' could never be digitised and be available to the public without the prior consent of the rightholder.

From a moral perspective, the 'orphan' works problem is like shopping at a store when the cashier left his post. You want to pay for the goods, but no one is there to accept your money (Colleran, 2007-2008).

'Orphan' works could be used in different ways: they could be used by individual subsequent creators, for private uses and for large scale access projects. The last category indicates institutional users aiming to make a large quantity of works available to the public by digitizing and posting their collections on line. This category includes academic or non profit institutions, such as archives, museums and -most importantly- libraries (see analytically Gompel, 2013; Eechoud et al., 2009, p. 278). This paper will analyze the 'orphan' works issue primarily from their perspective, and in particular, from digital libraries perspective.

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