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Taking care of ORPHANS

When to work with Orphans

Proposed copyright legislation on 'orphan works' (ie. copyright assets whose ownership is unknown) is intended first and foremost to allow public bodies (museums in particular), to make non-commercial use of items in their collections.

Only in more recent years has the application of copyright and licensing become so established that gifts to museums, or even appearances by musicians on the BBC, are now carefully governed and documented and the rights and acknowledgements fully known.

Likewise, personal deposits of family archive photos and footage in regional archives now have a usefulness that was little imagined when these social history records were created or passed to archives for preservation.

Making use of these assets exposes the publisher /broadcaster etc. to civil and criminal action – particularly when it is know to be within copyright (eg. within 70 years of the author's death).

However, whether an asset is in copyright or not may be very unclear and whilst schemes are being proposed to enable exploitation of assets (eg. with payments into a copyright collecting society pool), particularly by publicly funded bodies, the decriminalisation has yet to be addressed!

A documentary producer may be prepared to run the risk of infringement, citing 'Fair Use'(a danger in itself, discussed in a later paper). But, an educational publisher may consider such risk unjustified. A museum may wish to invest in clarifying what rights it actually holds or consider researching similar assets from elsewhere that it knows can be cleared.

All change – no change

Lawyers debating the wisdom of orphan schemes are themselves very divided on the benefits of introducing legislation.

As noted in our earlier white paper (see below), a "reasonable" working solution has been employed by media professionals for decades, based on a risk assessment, a judgement of the value of the asset to be exploited and an estimation of what damages a court would award to any copyright holder

coming forward - that award being based on the assumption of a benign court awarding no more than a “reasonable fee” for its exploitation (ie. a ‘fair market value’ agreed between a willing seller and a willing buyer).

The current Orphan Works Bill revision in the US Senate looks set to provoke copyright holders more than its predecessor. Licencees should be aware that photographers and agencies are highly likely to want to challenge any law with test cases and so should be especially vigilant!

However, whilst the British Copyright Council may take the view that this is a reasonable way to continue ‘managing’ orphan works, in my opinion it remains wholly unsatisfactory. Copyright is much more keenly, commonly and excitedly contested in the digital age, where we are all potential producers and consumers of rights. There is therefore a distinct danger that a minor or accidental or benign infringement will not be met with a *reasonable* fee to pay but a whole scale outrage by the copyright holder, invoking Human Rights legislation and goodness knows what, additional to expensive claims.

Conclusion

The debate has therefore a very long way to go before resolution will be considered by legislators, for whom this is perhaps even less of a priority now that it was when Andrew Gowers first reported to the UK Government in 2006.

My advice is to continue avoidance of media assets of any doubtful provenance without taking a full risk assessment. For many museums exploiting their own collections and for ‘justified in the public interest’ broadcasting, there will remain reasons to take that risk. For most publishers and multimedia producers the risk can most often be avoided with some additional research and new assets substituted.

Zooid always employs due diligence when managing orphans, but this too is under attack - and is the subject of a future Zooid white paper!

For an earlier introduction to this subject, please see [Zooid white paper 090323](#)

Please call me on +44 20 7267 9990 if you would like to discuss any of the above

Richard Philpott

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