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## Orphan Works – new parents?

### What's this all about?

The last few months have seen an increasing interest of national and international legislators with regards to what to do with orphan works and how to make it simpler to exploit them for all those purposes that do not fall under the fair dealing exceptions.

This is true especially in the light of the Digital Agenda for Europe, a flagship initiative comprised in Europe 2020 and aimed at reviving the economy of the EU by 2020. In May 2011, Brussels drafted a Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works (to which a report and an addendum have been released in 2012). Interestingly, this called for the creation of a legal framework to facilitate the *cross-border* digitisation and dissemination of orphan works in the single market, and ensure the lawful, *cross-border online* access to orphan works contained in online digital libraries or archives. In the UK, the diagnostic report Rights and Wrongs (issued in March this year), following the Hargreaves Review, confronted similar issues, and a report was finally released in July 2012 (Digital Copyright Exchange Report).

When confronted with the issue of exploiting orphan works (defined as works subject to copyright or related rights for which no right-holder is identified or, even if identified, is not located), the options available are: 'do nothing' (honestly!); contemplate a statutory exception to copyright with regards to orphan works; set up extended collective licensing; set up an orphan specific licence granted by a public body; the mutual recognition of national solutions regarding orphan works.

In the UK, to help simplify copyright licensing while protecting the interests of rights holders, the Government has proposed to create a power which could be used to allow voluntary **extended collective licensing (ECL) schemes** to be authorised in the UK for the first time. This would mean that collecting societies that meet the necessary standards for protecting rights holders' interests could seek permission to license on behalf of rights holders who are not members, with the exception of those who opt out of the scheme.

## Why should I care?

Allowing professional bodies to take on the exclusive responsibility to collect on behalf of unknown right-holders would certainly have the immense benefit of releasing publishers and content users from the threat of potential suites for breach of copyright (never published an orphan work, anyone?), but it certainly comes at a price! The administrative burden and the fee structures that would be adopted (collecting societies are notoriously not open to negotiations) will also be a reason for concern.

## Conclusion

Extended Collective Licence (ECL) schemes are normally only valid in the national territory in which the statutory presumption applies. The European response to the orphan works debate is unlikely to follow that path.

However, the Report on the Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works leaves the Member States free to choose their own arrangements on any form of rights' management systems, *such as extended collective licences* (art. 7a). This of course enables the UK to proceed with an ECL scheme, but makes a harmonisation at European level yet again far from happening.

The debate on how to most effectively exploit orphan works without having to deal with **the threat of being sued** despite all due diligence is far from coming to an end!

Other Zooid papers:

[Copyright and IP + Due Diligence, Orphan works and Cheap Stock](#)

- [Zooid white paper 090323](#)

[Taking Care of Orphans](#)

- [Zooid white paper 090717](#)

[Demonstrating Due Diligence](#)

- [Zooid white paper 090731](#)

[Legacy & Integrity](#)

- [Zooid white paper 090801](#)

[Outsourcing, Offshoring & Outlaws](#)

- [Zooid white paper 090810](#)

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

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Thursday, 16 August, 2012