

IFLA/IPA Joint Statement on Orphan Works June 2007

Increasing attention has been given in recent years to works of which the copyright owner cannot be identified and located by someone who wishes to make use of the work in a manner that requires the owner's permission. Such works have been termed "Orphan Works". To maintain the appropriate balance between owners and users of copyrighted works, it is important to ensure that copyright laws can be adapted to special circumstances where necessary.

"Orphan works" present such a special circumstance. Occasionally, it is impossible to identify, locate and/or contact the legitimate holder of the relevant rights ("copyright owner") when the intended use requires obtaining permission to use his/her work. Such orphan works risk exclusion from the cycle constituted by creation and use, as users risk liability for copyright infringement if they have no means of securing necessary permissions.

To promote the public interest while protecting owner's rights and countering the risk of infringement, IFLA and IPA strongly support efforts aimed at enabling the use of orphan works, provided the issues outlined below are addressed in any regulative initiative in this area:

1. Reasonably diligent search for the copyright owner:

- The potential user of orphan works should be required to conduct a reasonably diligent search in good faith, with a view to identifying, locating and/or contacting the copyright owner, prior to using the orphan work.
- The reasonably diligent search should be conducted with a high level of care. The potential user should not only research the identity/location of the current copyright owner but also inform her/himself about the full array of possible sources where such information can be found.
- Any regulative initiative should refrain from prescribing the number of search steps or information sources to be consulted. Only a flexible approach will ensure an adequate solution dealing with the individual circumstances of each orphan work, the different kinds of information resources available in different countries and for different types of work, and the rapidly changing information sources and search techniques.
- Stakeholders should be encouraged to develop and make publicly available guidance on what they consider a reasonably diligent search. This guidance must be flexible, as resources available change and improve, and may be quite different for different formats and national circumstances.

- The user of an orphan work should bear the burden of proving that her/his search complied with the guidance mentioned above.

2. Clear and adequate attribution:

- The user of orphan works should be required to provide clear and adequate attribution to the copyright owner(s) in his/her use of the work. Whether or not an attribution is clear and adequate should depend on the individual circumstances of each case.

3. Reasonable remuneration of copyright owner or appropriate restitution:

- Any regulative system should provide that a reappearing copyright owner is to be reinstated in an appropriate and reasonable manner as the actual rightsholder, taking into account also the legitimate interests of the user in his/her continued exploitation of the previously orphaned work.
- The reinstated rightsholder should be entitled either to reasonable remuneration for the user's use of the previously orphaned work or, in the case of non-commercial uses by nonprofit institutions, such as libraries, to expeditious termination of the unauthorized use.
- Any user who has conducted a reasonably diligent search should not be penalized for use of the work

4. Limitation on injunctive relief: Where injunctive relief is available against the continued and future use of a previously orphaned work, any regulative system should ensure that such injunctive relief is sufficiently flexible to take into account the creative efforts and investment made by the user in good faith.

5. Non-exclusivity of use: The use of orphan works is non-exclusive. A user of orphan works can intervene against further uses of the same orphan work only where the further use would infringe her/his new rights in derivative works (e.g., translations, adaptations).

N.B.: Nothing in these principles affects the rights of copyright owners to ignore or refuse requests for licenses, or the rights of users to invoke fair use or fair dealing in using copyrighted works. This statement also should not be seen to affect the existing legal framework regarding the duration of copyright, the scope of copyright liability, or limitations and exceptions for libraries.

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