EUROPEAN
VISUAL
ARTISTS

ORPHAN WORKS STUDY: SUBMISSION BY EUROPEAN VISUAL ARTISTS (EVA)

WHO WE ARE

EVA represents the European collective management societies managing visual repertoires. They manage rights of close to 100 000 authors including painters, sculptors, illustrators, photographers, designers and other authors of still images. Our members conclude bilateral licensing agreements with single commercial users such as book and poster publishers, producers of merchandising products and others. With large-scale users such as museums and public broadcasters who require a range of rights to fulfill their tasks they conclude frame contracts, which regularly cover the entire repertoire. EVA members license uses based on published tariffs.

Besides, our members manage the resale right to the benefit of the author of an original work resold on the art market and remuneration rights, such as reprography, private copy, public lending and cable retransmission. www.evartists.org

Since 2002 our members manage multi-territory licenses for online uses through OnLineArt an international organization with members in Europe, U.S., Canada, Australia and Latin America. www.onlineart.info

Artist's Rights Society (ARS) is our members' partner in the United States.

We refer to the ARS submission provided by Theodor Feder.

BACKGROUND – EUROPEAN EXPERIENCES

The European Union addressed two issues related to mass digitization in publicly accessible libraries and other cultural institutions, namely the orphan works directive and a memorandum of understanding on works that are out of commerce (which was signed by EVA). Both categories concern protected works, which have an author and rights holder, but in one case they are not identifiable or not traceable while in the other case the authors and rights holders decided not to exploit the works any longer. Use of such works is intended to facilitate performance of the social and cultural tasks of publicly accessible cultural institutions.

Outside of this defined purpose - and the beneficiaries - uses follow different rules and the privileges of the Directive do not apply. Any public institutions or publisher, ISP and other user intending to gain profit with a product or service containing protected work may be required to contact authors and their representative as it is the case today. Depending on the project frame contracts or specific license agreements can be concluded.

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The European Commission expressed no intention to re-enter in the issue and therefore there is no mentioning in the Commission's Digital Market Strategy, which was launched on 5 June 2015.
In several member countries successful models of collective licensing are in place and these are depending on the national traditions either based on negotiations between the parties involved, as it is the case in Nordic countries with their tradition of Extended Collective Licensing, or on blanket licenses or based on exceptions with remuneration for authors managed by mandatory collective management.
These different traditional schemes of collective management work even more efficiently for all parties involved where a legal backing is in place with the presumption to be entitled to act for non-members. This should be completed with and unwaivable right of authors to opt-out at anytime.

For mass digitization project the Nordic system of **Extended Collective Licensing (ECL)** has proven a successful model. For this model the representative bodies of users and authors' parties have to negotiate a model contract, which is then applied to all uses of the same kind. It requires a legal backing and the existence of parties, which are representative for their category of users or authors. The legislation contains the main rules and lines for the ECL including an opt-out for authors, which do not want to be part of the agreement.

In any case the existence of a functional visual authors collecting society governed by authors is indispensable to make the system work and to ensure that the authors receive the revenues.

IMAGES EMBEDDED IN ORPHAN WORKS = ORPHAN IMAGES?
Rightfully the Copyright Office points out the particularities of the visual repertoire. Additionally visual works are increasingly used both on analogue and digital media and products. Following studies undertaken regularly for distribution purposes we observe a trend including private users that up- and down load and copy third party images; the increase appears to be not only related to the ease of self made picture. We would recommend that the Copy Right Office should undertake research to better know the extent of today's use of image works.
Due to their category be it art or graphic work, illustration or photography they are differently marketed and as a consequent identification of visual work differs.
An important principle is that embedded works do not qualify as orphan if the media that includes the work is orphan and follows its own rules.
More details are available in the Feasibility Study which EVA and CEPIC prepared jointly for ARROW http://www.evartists.org/en/news_detail.html?category=1&id=17

REGISTRIES
It would be an unjustified burden for foreign authors to be obliged to register works in the US. If the work is not registered the potential users would conclude that no author needs to be consulted before the use. Thus, the register would develop a formal condition for the protection of a work and therefore infringe the Berne Convention.
Because most authors create huge numbers of works a complete registry would not be possible and therefore the authors would nonetheless never achieve appropriate protection. For more details we refer to the position by Artists' Rights Society.

ENFORCEMENT

If the authors have to track down uses of their works and enforce their rights in court the great majority of infringements will pass without being pursued. A system building on the capacity of enforcing one's rights is not author friendly.

Contractual agreements ahead of usage and legal provisions for collective management prevent infringements of rights before the use is taking place, which significantly reduces costs of ex-post regulations following infringing acts.

WHO WOULD BENEFIT?

Libraries and other cultural institutions have to manage the high costs occurring with the digitization of works. Additional diligent search efforts add to the costs without providing sufficient legal certainty – in particular for embedded images. These institutions would not need commercial rights because their purpose is one of public interest and not of profit making.

However, sharing and social media platforms would be part of the benefitting parties. In general these commercial platforms require in their general rules from their users the right to make commercial use of the content up-loaded to their networks. Additionally they regularly require from users that the content is free of rights of third parties. Libraries and other cultural institutions increasingly have accounts on social media and sharing platforms. In order to comply with user's guidelines of the platforms they need more rights than necessary for their own purposes.

In general the increase of content available online without any rights is an increase of business opportunities for these third party users and clearly outnumbering any net income prospect of cultural institutions which have to calculate with an increase of administrational burden without achieving full legal certainty.

With an orphan work legislation as in preparation the authors however, would be in the lose-lose position: being confronted with an institution that has no budget line for authors after high expenses on digitization or either invest in expensive enforcement efforts including registration and uncertain outcomes of legal cases.

NO FUTURE ORPHAN WORKS

The problems causing difficulties to identify and trace authors should become one of the past. Clear identification of the works by their users and registration of usage in a searchable manner would be an efficient means to prevent that author's of image works and there representatives are difficult to trace. The envisaged legislation however creates an incentive for users of works to not find authors and to continue with practices, which create new "orphan works".

The transfer of value created by commercial platforms back to the authors is needed to ensure future creation of visual works.

RECOMMENDATIONS AND CONCLUSIONS

1. **Orphan Works legislation is not benefitting anybody but commercial third users**
2. **Diligent search and registers cause huge costs are a heavy burden on visual authors**
3. **Not-registered works are understood as not-protected**
4. **Legal risks and costs are unilateral shifted to authors**
5. **Commercial Social media and sharing platforms are beneficiaries of digital free content online**
6. **Orphan Works legislation hampers efforts to achieve transfer of value**
7. **Collective Management Societies <u>governed by visual authors provide</u> appropriate solutions**
8. **Collective management solutions deserve to be supported by the legislator where needed**
9. **Outside of large scale uses no privileges for works whose authors are not identified or not traced should not apply**