BILD-KUNST

Verwertungsgesellschaft BILD-KUNST 53113 Bonn Weberstraße 61 Rechtsfähiger Verein kraft staatlicher Verleihung Sitz Frankfurt am Main

Catherine Rowland
Senior Advisor to the Register of Copyrights
U.S. Copyright Office
(202) 707-0956
crowland@loc.gov

7/23/2015

Re. Orphan works – reloaded

Dear Madam,

We thank you for the possibility to respond to the inquiry on Copyright Protection for Certain Visual works. We very much appreciate the attention given to the situation of his group of highly vulnerable authors who contribute increasingly to attractive media, both analogue and digital.

I am writing to you in my position as director of legal affairs of VG Bild-Kunst, the German CMO for visual artists and publishers and I am happy to share the experience with the European Directive on Orphan Works with the Copyright Office.

On the initiative of the Library of Congress, legislation on orphan works was brought under way nearly a decade ago. The legislative process was stayed when the author's representatives and Google reached the so called Google settlement and only taken up again after the settlement was rejected by the court. In the meantime, the European Commission found the US-legislative solution attractive and issued a directive on orphan works – but limited the uses permissible after diligent search to non-commercial use by public cultural institutions.

Vorsitzende des Verwaltungsrats
Lutz Fischmann, C. Cay Wesnigk, Frank Michael Zeidler
SEB Bank AG, BIC ESSEDE5F380, IBAN DE75 3801 0111 1024 7916 00
Commerzbank Köln, BIC DRESDEFF370, IBAN DE08 3708 0040 0207 2695 00
Steuer-Nr. 205/5775/0361, USt-IdNr. DE122126060

Vorstand
Frauke Ancker, Werner Schaub, Rolf Silber
Dr. Urban Pappi (geschäftsführendes Vorstandsmitglied)
Bonn, Ruf (0228) 9 15 34-0, Fax 9 15 34-39, email info@bildkunst.de
10963 Berlin, Köthener Str. 44, Ruf (0 30) 2 61 38 79, Fax (0 30) 23 00 36 29

The issue of orphan works is an issue of mass digitization as the Copyrights Office´s Study of June 2015 rightly points out. Cultural institutions who want (or are expected) to make their collections available online need to clear rights on a massive scale. This (individual) rights clearance process is already difficult where the author/right holder is known but impossible for the big share of works in the collection where the author either cannot be identified – or, if identified – be contacted. Hence, the Copyright Office concluded rightly that the problem of obtaining licenses for mass digitization can best be addressed through CLO-solutions.

What is surprising then, is that the very same report suggests additional legislation on orphan works. From the German perspective it is hard to see a need for such legislation: the vast majority of cases and the cultural aspect of making accessible public collections online is and remains a problem of mass digitization.

A CLO based solution can work both for cultural non-profit institutions and for large scale commercial users. Yet, it would need legal backing. An enormous advantage of legal limitations to copyright, whether they are ECL like in the Scandinavian countries or remunerated exceptions as in the continental European countries, is that they allow to define both beneficiaries of the exemption and the uses allowed under it, rather than trying to solve only one aspect (orphan works) of a more general problem (mass digitization).

Only the commercial use of individual works would be left open once a solution for mass digitization is found. For the commercial use of individual protected works of course a license should be needed – irrespective of whether the work is orphan or not. There is no reason shown why the basis rule of copyright "no use without prior permission" should not be applicable to orphan works.

Only large scale commercial users profit from an orphan work legislation, because they do not want to pay authors for the use of their works – and orphan works regulations help them evade legal responsibility.

Experience in Europe clearly shows that orphan works legislation does not solve any of the problems connected to (cultural) mass digitization. The diligent search requirement generates high cost and is inefficient. Five years after the implementation into national law, hardly any German institution dares to rely on diligent search and the subsequent use of orphan works: the institutions are forced to spend an enormous amount of manpower and money in the search and its documentation. But the orphan work legislation gives no incentive to really "find" the right holder. Once the right holder is identified and traced down to a factual contact, license agreements must be concluded individually with each identified right holder and no funding is left for licenses because it has already been consumed by diligent search.

If a diligent search is performed, the result for identified authors is devastating: more often than not they are confronted with a quirky alternative: agree to waive to remuneration or not be included in the collection. So, slowly, unremunerated use for foreign works will become standard. This is the real outcome of the orphan works directive for authors!

For visual authors, the issue of orphan works is very crucial, as often legal first uses in print or internet separate the copyright information and meta-data form the work used and as a result right holders of visual works are more difficult to identify than e.g. a text author– orphan works proliferate! This was the clear outcome of the ARROW and ARROW + projects in Europe, where the attempt was made to generate a database for right holders in published books in public libraries. Whereas the identification results for publisher and (main) author were surprisingly good, all systems failed to bring reasonable results for embedded content, mainly images. Therefor any legislation on orphan works is extremely dangerous for visual authors of all repertoires, from fine art through photography to illustration – their works are most likely to become orphan easily and they are the ones who are forced to waive to any remuneration, because it is "only one image" of the individual author to be included in a certain project.

For all these briefly sketched arguments, we urge the U.S. Copyright office to refrain from taking up again orphan works legislation. It does not solve any of the problems libraries and cultural institutions face with mass digitization and only large scale commercial users benefit of such legislation. We rather suggest to explore in more detail the pragmatic approach suggested in the June 2015 Report on CLO solutions for mass digitization and provide for legal backing.. The rejected Google Settlement Agreement already pointed in this direction – and for the first time in anglo-saxon copyright environment, authors and publishers would have had to commonly work out a distribution model where authors, too, would receive remuneration.

Form the international experience with licensing visual works (and so allowing legal access to these works) a major obstacle to licensing is the difficulty of rights enforcement under the anglo-saxon procedural rules. As there is hardly ever a reimbursement in costs for the winning party in court, the financial risk of taking a copyright matter to court is extremely high. Personally, I shall never forget a major British art publisher who refused taking licenses from the artists - who smilingly told me at the Frankfort book fair: sue us if you can afford it! Thank god, we could (successfully) sue him in Germany.

We truly hope that the small claims approach taken by the Copyright Office brings some relief to this potentially author-hostile legal situation.

We would be happy to answer to any further question that might arise and to share our experience on pragmatic CLO solutions in Europe.

Sincerely yours,

Dr. Anke Schierholz
(Director legal affairs)