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**MILE**

## **Metadata IPR Seminar 2 & Report**

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***eContentplus***

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<sup>1</sup> OJ L 79, 24.3.2005, p. 1.

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## 0. Introduction

On 4<sup>th</sup> April 2008 two separate Bills proposing Orphan Works legislation were presented to the Senate and the House of Representatives. On 4<sup>th</sup> June 2008, the High Level Expert Group's (HLEG's) Copyright Subcommittee published a Memorandum of Understanding on Orphan Works, which was "signed by representatives of libraries, archives, audiovisual archives and rights-holders... it will help cultural institutions to digitise books, films and music whose authors are unknown, making them available to the public online<sup>2</sup>." A US company, Copyright Clearance Center, has created an open-access, community-based pilot for an online Orphan Works registry, [www.discoverworks.org](http://www.discoverworks.org); a UK copyright collecting society is proposing a business model solution regarding Orphan Works; while back in the US, PACA is offering a low-tech, automated, not-for-profit search model in the hope of establishing this as part of a Due Diligence process, and this has apparently already had promising results<sup>3</sup>. The building momentum regarding the Orphan Works issue within the international picture industry is impossible to ignore, and MILE decided to use this opportunity to make the Orphan Works issue the central focus of its seminar, *IPR Solutions?*

This seminar's original outline focus, as written in MILE's DoW, was on technological solutions to image piracy; "to showcase and discuss potential solutions to piracy with technological developments in digital watermarking, define licence exceptions' boundaries with 'creative commons', 'educational fair use' and 'due diligence' and discuss what other measures could be taken to disseminate digital content more widely." Shifting the focus from just technological solutions to examining an existing issue within the picture industry and exploring the range of solutions available – legislative, technological, licensing and otherwise – was a chance to create groundwork for tangible project results. By focusing on a specific issue, MILE's aim was that practical solutions and suggestions be formulated from the accumulative expertise presented both by its speakers and by the audience delegates. Therefore it concentrated on the seminar definition within Annex 1, DoW, by investigating potential solutions in the form of licence exceptions such as 'educational fair use', 'creative commons' and 'due diligence'<sup>4</sup>, and the focus was Orphan Works.

Intellectual Property Rights and Copyright present a number of complex issues for the digitisation and exchange of images, and for improving metadata systems. Commercial users of image libraries are nervous of working with copyrighted digital images because of a lack of understanding, the extra administrative work involved in clearing rights, and fear of the results of infringement of the IPR procedures. This is particularly true for cases where information about the rights holder(s) of an image is not known. Such images are commonly referred to as "Orphan Works". This puts image libraries and users who want to exploit these images in a difficult position. If they sell and/ or use these images and the rights holder(s) come forward, the image users are legally liable. The lack of standardisation of IPR law across the EU and the implementation of different regulations in each member state further complicates the IPR situation for image holders and providers.

Metadata is important for Copyright protection, through identifying pictures, authors and sources. The only way we know who holds the IPR in any image is through the textual metadata attached. When in some cases, information about the rights holder(s) of an image cannot be found, these images are our "Orphan Works". This prevents digital image metadata creators from adding this information.

Digital rights management' can involve tying users into licence agreements to restrict potential abuse. The punishments for infringement of such agreements have become more

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<sup>2</sup> *Group's Meetings*, 04.08.2008,

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/hleg/hleg\\_meetings/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/hleg/hleg_meetings/index_en.htm)

<sup>3</sup> *Orphan Works and Orphan Search*, 04.08.2008, <http://www.pacoffice.org/orphan.shtml>

<sup>4</sup> *Annex 1, WP4, Metadata IPR*, in *DoW*, p.29, p.36

strictly enforced over the last few years<sup>i</sup> due to incidents such as the NAPSTER case in digital music.

MILE's first seminar on Metadata IPR – *IPR Frameworks* – established the positions, problems and compromises of widening access to digital images on the Internet, and concluded that the problems regarding metadata IPR are due to;

- Lack of clear and intuitive rights metadata information regarding digital images;
- Lack of consistency regarding rights metadata attributions to images;
- Lack of fundamental understanding of digital image copyright;
- Lack of understanding of the difference between Copyright and reproduction rights;
- Lack of understanding of the layers of Copyright within a digital image, which metadata should be attached to which layer, and which metadata IS NOT necessary to attach.

*IPR Frameworks* revealed differences between countries that have common law, such as UK and Ireland, and the civil law legislation as found in the US. These differences may have a direct bearing on proposed resolutions to the Orphan Works problem. Moral rights are still not harmonised across all territories, but generally there is a greater degree of harmonisation especially with regard to The Berne Convention and EC Directives. Christina Michalos, a leading UK IPR barrister and speaker at *IPR Frameworks*, suggested that there is a general shift towards the philosophy of Civil Law.

Liability for the use of an Orphan Work differs from country to country. In Sweden, if the metadata is lacking, the person responsible for providing the metadata is responsible as a whole for its use. In the UK, if work is for commercial use it is the end user's legal responsibility to perform a diligent search for the copyright holder. However, if the copyright holder is not found, the rules of use are unclear. MILE investigated various proposals to further this work including the [PLUS](#) registry and the development of IPTC to include intellectual property rights specific fields. Overall, it was clear from this seminar that further discussion was needed to promote a better understanding of the pros and cons of pursuing a legislative solution to Orphan Works, a need which was factored into the planning of the next seminar, *IPR Solutions*.

MILE's seminar *IPR Solutions* gathered copyright experts, lawyers, image users, rights holders' associations and technology providers from Europe and the US to discuss and assess the potential impact of current legislative and non-legislative Orphan Works proposals; to achieve a cross-border, cross-industry and cross-territory report on the current position of Orphan Works legislation. The seminar saw the public opening of the MILE Orphan Works database, aimed at establishing a precedent for best practice guidance for due diligence process. It also looked at the effectiveness of the Canadian licensing scheme designed for the exploitation of Orphan Works images.

## **1. Mario Bouchard (General Counsel, Copyright Board of Canada) and Edmund Quilty (Copyright & IP Enforcement Director, UK Intellectual Property Office): discussing Orphan Works Legislation in Canada**

Mario Bouchard gave an overview of the Canadian Orphan Works regime, describing its evolution and analyzing its impact.

The Copyright Board of Canada adopted a legislative approach towards Orphan Works in response to recommendations from the Economic Council, the Keys and Brunet report, and following evaluations of UK reviews of copyright law. The Canadian statutory review resulted in the current system for dealing with unlocatable copyright owners. The system is run by the Copyright Board of Canada (The CBC), an economic, regulatory body issuing licences for the use of works when the copyright owner cannot be located. supervise agreements between users and licensing bodies. The CBC may establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyright works, when the administration of such copyright is entrusted to a copyright collective society.

This system has been in place for 20 years. It is an upstream licensing system as opposed to the downstream system currently being contemplated in the US. Non-exclusive licences are issued for any copyright subject matter, as long as it is either being published or fixed in some way. The crucial provision is that the applicant must satisfy the Board that he has made reasonable efforts to locate the copyright owner and the owner cannot be located, i.e. exercised Due Diligence to avoid committing the offence. Advice as to what constitutes a reasonable effort is available; however, it is not prescriptive.

The CBC deals with issues on a case-by-case basis, and is flexible on what constitutes a reasonable search depending on the nature of the work being used. The CBC has the discretion to grant the licence but there is no obligation; licences can be refused, for example if the use is deemed offensive. The Board will set the terms and conditions for a licence, such as the amount of royalties to be paid and the duration of the licence, prior to issue. Fees are agreed between The CBC and the user or collecting society.

The licence specifies the following:

- It defines the authorized use (for example, how many copies you can make, to whom you may distribute them and for what purpose);
- It states the expiry date of the licence;
- It states the licence fee.

The Board usually orders that the payment of the royalties fixed by the licence be made directly to a copyright collecting society that would normally represent the unlocatable copyright owner. The Board allows the copyright collecting society to dispose of the royalties as it sees fit for the general benefit of its members. However, the copyright collecting society undertakes to reimburse any person who establishes, within 5 years after the expiry of the licence, ownership of the copyright of the work covered by the licence; this is seen either to be illegal, or politically ill-advised.

### **The Impact of the Canadian Regime**

Since its beginning, The CBC have dealt with in excess of 400 files and 12,500 works with about 4% of applicants filed by gallery or museums, 9% by the government and 14% by

educational institutions. On the whole, half of the total enquiries are granted licences to a variety of users and usages.

The advantages of the Canadian regime are:

- It is fairly open-ended, as long as the fixation publication requirement is set;
- It's about as good an insurance policy against prosecution as is possible, because the law limits the time for the copyright owner to claim;
- It helps find copyright owners, so far 1 in every 5 cases found;
- It's top-heavy for individual users but highly effective for mass digitization projects as mass protocols are worked out at the offset, and then it's a case of continuing to control what should and should not be licenced (*is this lip service?*).

The disadvantages are:

- The delays due to the administrative process;
- The legal limits on the time for the copyright owner to claim are only good as an insurance policy against prosecution until there is a successful legal challenge!
- Despite the statistic that copyright holders are found in 20% of cases, there have been relatively few applications since the model has been in practice;
- The heavy administrative burden;
- The cost both to The CBC and the potential user.

## Discussion and Questions

Edmund Quilty (Copyright & IP Enforcement Director, UK Intellectual Property Office) explained that the growing concern with Orphan Works (in the UK) was the protagonist for The Gowers' Review of Intellectual Property of Intellectual Property in 2006. Stakeholders and users agree that there is a problem, but the variety of differing perspectives from different sectors makes solutions difficult. The UK is now in a position of having to decide what to do, crucially whether to follow the statutory route, to give legislative cover or to follow the voluntary route. The latter would be less involving for the any government.

The audience posed questions to Mario Bouchard as follows;

**Q.** How did you determine costs incurred by the Canadian administrative tribunal?

**A.** Costs are not actually that much of a problem.

**Q.** The CBC deals with each enquiry on a case by case basis. This is labour intensive. Is a generic search feasible?

**A.** The process is labour-intensive and costly. A cheap forum (such as the MILE Orphan Works database) for this is interesting but I'm not sure about the workability.

**Q.** Do you agree that the Canadian argument for case by case versus regulation be raised?

**A.** *Not answered.*

**Q.** What about issues around international use?

**A.** Licences only apply to material that is used in Canada.

**Q.** How does The CBC make decisions regarding payment? If a collecting society is used, how are the right levels for indemnity set? Do you agree that a top-heavy system versus a light system is workable?

**A.** Individual clearing of searches and mass digitization can be done by working out the protocols before hand.

**Q.** Should the solution be upstream or downstream? The current argument is that upstream would allow people to know where they stand before they start using Orphan Works. Any solution should be resolvable before use, not after – otherwise it's a disincentive for users.

**A.** An upstream solution is possible. International issues can be worked out and voluntary solutions could be premised.

**Q.** What is the average timescale for licensing in Canada?

**A.** The timescale varies from case to case. Complicated cases can take time most applications are dealt with within two months.

**Q.** Why do you think the Canadian system has not been used more?

**A.** Many people are unaware of their copyright responsibility. There are large sectors of commercial users whose cultures premise on a systematic violation of copyright. It is used more than any other similar system in the world. The UK has section 1.30 which has had two applications since it was established and the Japanese system has only been used 40 times since it was established in 1967!

**Q.** Would the Canadian system incur substantial costs to those involved in mass digitization projects?

**A.** If Due Diligence is carried out for every work, yes, it would be costly.

**Q.** How exactly does The CBC (case by case) cope with mass digitization projects, what role does meaningful Due Diligence play in the process? How effective is it and can you supervise it?

**A.** Applicants learn the process for Due Diligence and duplicate the process for repeat applications.

**Q.** How many rights holders show up after a licence has been granted and listed on the website, and why are the copyright holders not found during the Due Diligence search?

**A.** The CBC finds about 20% of copyright holders after the licence is granted. With regards to payments, in cases where a copyright holder is found after the statutory 5 year period has expired, they will be paid after the period has expired. Copyright holders are not found during Due Diligence due to the complexity of estates, abandoned estates historical legalities and limited knowledge, ability or resourcefulness.

**Q.** What is the difference between the Canadian Legislation and the US?

**A.** The US legislation proposes a certain number of criteria before users can claim the shelter of legislation and it relies on a database. The Canadian system has a simple on/off switch.

## **Conclusions**

The implications of implementing a legislative solution such as Canada's fall into three main categories; legal, economic, and practical. A thorough identification of all the IPR challenges for Orphan Works solutions will indicate which actions and protocols could, if properly implemented, reduce licence proliferation, increase pay restitution and guide a practical approach to the problem. However, creating evidence of a legitimate audit trail in the event of a dispute can be very difficult, and the internet itself raises a number of issues on this point. How dependent will stakeholders be on search engines, and are web-based searches authoritative enough? One search engine's results differ from another's. Moreover, are the

listed references in a global Web enough? Are they known by 'any' possible potential creator from different countries? And how do you prevent a linguistic bias in a search and is this likely to be a problem? The Canadian experience suggests that assiduous protocols for Due

Diligence must be described, and a control of production and material supply must be enforced. This overlaps onto the practicalities of following such a model; the Canadian system appears to rely heavily on the digital age - if it did not, the time involved would be prohibitive – but this of course makes assumptions that users have access to, and knowledge of, computers and the internet. The cases where users have neither are not catered for, which would surely present an immediate problem for Due Diligence!

The percentage of applications for images was not stated, but the approximate number of works dealt with since its instigation is 12,500. That's not many. And if we base this figure on the British Library's percentage for potential Orphan Works, which is 40%, then these figures are extremely small. This poses overall economic and practical questions; is the system economically viable and does it make sufficient impact, especially with regards to enhancing the availability of cultural artefacts? The complexity of and differences between individual cases suggest that there is no 'process' and that each case would require an independent search in order to establish defensible Due Diligence. In the case of mass digitization projects, protocols need to be established.

From an economic perspective, the Canadian system places enormous demands on stakeholders' time and money. A cost benefit analysis here would be useful to gauge approximate expenses with regard to these factors. Bouchard also alluded to problems with compensation, but these were not expanded on. In all, the administration of payment is an area full of potential hazards, particularly if unregulated. The regulation of costs needs to be looked at from all users' perspective, to assess what is fair and workable. The risks for stakeholders and copyright holders need to be clearly assessed, and administrative systems and payment agreed on by all users prior to use.

The overall merits of a legislative solution was not discussed. The Canadian statute was built on pre-existing legislation through a process of reform and amendment initiated in the mid-1980s. Therefore the legislative process is open to investigation with regard to the EU Orphan Works problem; investigating its pros and cons will identify its relevance and if such a system is actually a necessity. There are significant time constraints inherent in developing legislation, as reflected by the development of the Canadian system. Legislation tends to be inflexible and can have the opposite effect to that which was intended – burdensome systems deter use, and perhaps even encourage illegal use. These are significant points to consider when formulating recommendations for future EC practice regarding Orphan Work images.

## 2. Jonathan Band (Lawyer and US Legislative Advisor on Orphan Works & Digital Image Use, [policybandwidth](#)) on the current Orphan Work Bills in Congress

Jonathan Band described the current proposed Orphan Works legislation in the US, analyzing and evaluating its problems. He stressed that this legislation was not a cure-all model, but another model to consider for either full or partial adoption.

The given purpose of two proposed Bills - presented to The House of Representatives and The Senate on 4th April this year – is to facilitate and find a way to make uses of Orphan Works. After initial groundwork on the issue in 2005, Orphan Works then stalled until earlier this year. The Congress ends in November 2008, and the current momentum and progress concerning Orphan Works is generating optimism that these Bills could pass. However, there is still a batch of complicated political issues to resolve which may obstruct them passing this time.

The basic framework involves the potential user performing a 'qualifying search'. Given that potential statutory damages could be anything up to \$150,000 per work, this has resulted in a climate of litigation fear which currently discourages use of these works, and these Bills aim to resolve this issue.

There are two exceptions already in place;

- 1) 'Fair Use', which deals with non-commercial usage and can incur 'Reasonable Compensation', and
- 2) 'Safe Harbour', which exists for libraries, archives and educational institutions.

In the former exception, 'Reasonable Compensation' amounts to what the involved parties would agree to had they found each other prior to the usage; in the latter, if the usage is stopped then 'Reasonable Compensation' does not have to be paid.

If a user is sued for using an Orphan Work, they must

- a) state clearly that they have used an Orphan Work;
- b) state that they have undertaken a reasonable search to locate the rights holders, and
- c) provide documentary evidence to support the search, which cannot be manufactured after litigation has commenced.

Some usages have been carved out of this legislation; for example, the use of Orphan Works on useful articles. So if you want to use an Orphan Work on a useful article like a t-shirt, towel, mug or shower curtain, you won't be protected under this law. This area is of great concern to cultural heritage institutions, whose revenue results in part from profiting from their collections by attaching them to commercial merchandise, which also acts to raise the institution's profile. Historically, this has been, and should continue to be, a viable way for them to make use of Orphan Works, but under the current proposals this is not permissible.

Both Bills suggest the establishment of at least two visual registries, which will impact on the effective legislation date. These will not necessarily be copyright registries, but certified mandators of cultural works so that a user can easily and safely use images while photographers' and artists' rights are being protected. These are envisaged as an easy and positive way to safeguard against copyright infringement within the use of these legislatively 'grey' works. But how exactly will these registries work in such a way that doesn't contravene The Berne Convention, and that guarantees safeguarding rights? The legislation is unclear on this point in both Bills; it should state precisely the steps which will be taken to

ensure protection of creators' and rights holders' rights, as vagueness will only create confusion over use and potentially also prevents use.

However, the politics arising from the various sectors which will be affected by this legislation are delicate and complex. It is supported by the publishing sector, but opposed by visual artists. The latter argue that, since the rights metadata identifying the creator does not always accompany an image, there is not always a clear source to contact for rights clearance. This is as opposed to publishing, which always has clearly identifiable contacts for rights clearance printed within each work. Those in favour of the legislation argue that if a use is made of a work, the creator will be paid for it at some point in the process, and therefore this is better than the work not being used and therefore having no commercial value or recompense attached. There's also the feeling that historically it has been hard for artists to protect their rights and will probably continue to be so, although such a 'laissez-faire' attitude is not a positive way to address the creators' current concerns!

The two most complex issues which currently threaten the passing of the legislation in this congress are;

- 1) The 'Notice of Use' file – this is present only in The House Bill and not the Senate Bill. This states that, prior to use, the user must register a file with the Copyright Office, outlining the work that he plans to use and the nature of the search he has undertaken for that work. This is to prevent fraud and to pre-empt fraudulent users fabricating a search after usage.

Cultural institutions are opposed to this because they claim that;

- a) if a user is willing to lie and fabricate evidence after the usage, they could lie at any point during the process and are therefore likely to lie before the usage;

Exactly how this will stop fraudulent users fabricating evidence is again unclear, which raises the question of proof of authenticity. And once again, in such cases, what constitutes a 'reasonable search'? Would print-outs of web-pages be sufficient? – bearing in mind that even basic computer users have the capability of faking such documentation.

- b) this creates a 'housekeeping' burden of work, particularly for multiple usages, e.g. mass digitization projects.

The creation of an administrative burden at this stage puts the onus directly onto the user. Such time will need to be factored into schedules for particular sectors, e.g. publishing, media, who have tight deadlines to meet, and thus as well as increasing the work burden it also necessarily expands the time spent on clearing the rights for works. This is prior to the time spent processing the application at the Copyright Office, which altogether stalls the availability of the work for use, which could drive potential users away from using Orphan Works. Could there a safe and legal way of automating this checking at the Copyright Office to try to speed up at least part of this process?

- 2) The creation of a 'Dark Archive' of these files; not searchable by owners, simply a deposit where the user keeps his Notice of Use file, in case proof of this search is called upon and such evidence needed.

To further counteract the creators' concerns, the incorporation of 'speed bumps' has been suggested which have been specifically designed to protect photographers and artists' rights. From a legislator's perspective though, such speed bumps could be pot-holes, or even total

barricades, obstructing use. Therefore, the idea of incorporating an Orphan Works symbol has also been introduced, which users must attach when using such a work to flag that the work's status as an Orphan, and to signify that they have taken the required steps for its usage.

In response to both the visual artists and the Motion Picture Association – the latter is a major influence on the shape of US copyright legislation – there is a desire to have a specified list of steps, or 'Due Diligence', that a user must ordinarily take in order for the search to qualify as reasonable, and that furthermore there should be Best Practices put out by the Copyright Office. The user must follow both these sets of steps for their search to qualify as 'reasonable'. The advantage of this combination of processes is to make the search safe and sensible; again it would slow up the process of making the work useable, but it proves commitment and validity of the user if they are willing to undertake this double-pronged process. Moreover, here the EC and UK have a greater amount of freedom in determining practice as the film industry is far smaller in these territories and therefore not as great an influence on their copyright legislation.

The main concern coming from the cultural institutions sector is that since all the searchers' proposed usages will be unique, there will be lots of empty formalisms and parts of the Best Practice that are totally irrelevant for each individual user. Libraries and museums, who have been searching for years, know how to search and where, so another concern is that there will be Best Practices which will be appropriate for commercial users but not for archival, educational or cultural heritage users, and vice versa.

Band's clear and evaluative analysis of the proposed legislation generated interesting feedback from the delegates. In particular, a point which arose several times throughout the whole seminar day was that some software actually removes copyright metadata within certain processes. Although such practice is currently illegal in the US, it is clearly not strongly enforced as this issue is not specifically addressed in the current Bills with regard to software developers.

As with the Canadian model, the question of cost also arises. This will be a consistent issue throughout any proposed legislation in any area, and the question should therefore focus on ensuring that ensuing costs are directed to where they will be best used. Since safety is paramount, this area may well be the one where money should be spent. Band foresees the question of cost being most clearly raised through the difficulty involved in developing just one set of practices for photographs, commercial and non-commercial usages. As a search involves three separate issues – who was the creator, who is the current owner, and where are they now? – these issues will be unique for every single situation, and therefore expensive to pursue. Search registries however will be voluntary, run by photographers and supported by technology; these should be put into practice as pilots for future models of use.

The development, by the Copyright Office, of a definitive set of standards for absolute compliance across all sectors is also necessary. Libraries already have standards and Best Practices, which give a certain amount of security, and legislation creators should build this knowledge into their legislation.

The carving out of various sectors from Orphan Works legislation is also a political possibility. It could, for example, be limited just to cultural heritage institutions. Due to the real level of hostility between photographers and advertising agencies, the latter could also be carved out of legislation! However, since cultural institutions can claim 'fair use,' limiting the legislation just to these users would be unnecessary.

But does the US model emphasise respect for copyright and related rights, economic and moral rights? The controversy over the proposed Bills points to the fact that there's clearly still much work to be done before the Legislation can be passed. The looser Regulations

proposed reach farther than simply the archives of non-profit community institutions such as museums and universities. Rather, the Bills have provoked commercial artists and photographers, among many others, fearing loss of income and control over their original works. The building of the two registries and defining the Due Diligence and Best Practices while in consultation with creators and other rights holders represents a serious and real body of work to be carried out, and I personally can't envisage that resolution of the major concerns raised by the Bills will be completed during this Congress session – there's too much noise from the artistic community to ignore.

Elements of these Bills are worth consideration for recommendation, such as the exceptions – 'Fair Use' and 'Safe Harbour' – and the establishment of a set of steps for Due Diligence which could be used throughout all EU Member States. In terms of these Bills as a model for EC solutions it's interesting to see the painstaking process by which a piece of law is created, developed, and – hopefully – passed by a government. Although this is the safest option available, it's certainly not the easiest to instigate. A potential recommendation therefore might focus instead on investigating and proposing a licensing scheme, using each Member State's collecting societies as the body to enforce this, and whether this organization is mandated is at the decision of each individual government.

**3. Panel discussion: Hugh Jones (Copyright Counsel, The Publishers' Association), Tom Morgan (Head of Rights & Reproductions, National Portrait Gallery), Pandora Mather-Lees (Managing Director of Sales, The Bridgeman Art Library) and Tim Padfield (Information Policy Consultant, The National Archives / LACA) in discussion / Q&A session with audience on the potential impact of Orphan Works legislative solutions to the use of Orphan Works images for cultural heritage, museums and publishing within the UK and the EU**

The purpose of the panel discussion was to present the viewpoints of the different sectors who will be affected by and involved in potential Orphan Works legislation, and how such perspectives might impact upon developments within the EU. The key sectors represented were;

<b>Museums and cultural heritage institutions</b>	<b>National Portrait Gallery (NPG)</b> Tom Morgan, Head of Rights and Reproductions
<b>Research and educational collections</b>	<b>The National Archives (NA)</b> Tim Padfield, Information Policy Consultant
<b>Commercial licensing agencies and image libraries</b>	<b>The Bridgeman Art Library (BAL)</b> Pandora Mather-Lees, Managing Director of Sales
<b>Publishing &amp; Rights Holders</b>	<b>The Publishers' Association (PA)</b> Hugh Jones, General Counsel

Following on from the perspectives offered from governmental and legal perspectives, it is important for MILE to consider the implications from the non-profit organizations, particularly given the criticism of bias towards commerciality facing the proposed US Bills. The discussion panel format allowed each speaker an equal forum to deliver their thoughts, hopes and concerns on solutions to Orphan Works issues, both legislative and otherwise.

### **Museums perspective**

The NPG faces both ways on copyright, being both owners and exploiters of rights. It's therefore a valuable and strong position to be in within the Orphan Works debate. The NPG has spent considerable resources on successfully tracing and securing rights, and also works in concertation with other copyright groups such as [WATCH \(Writers, Artists and their Copyright Holders\)](#) – a database of copyright contacts for writers, artists, and prominent figures in other creative fields. The scale and scope of the problems faced means the issues really need to be addressed in different ways, the primary issue being that there isn't just ONE Orphan Works problem; Orphan Works present a range of problems which need to be articulated.

Regarding consent within copyright, museums have experience of copyright as a corporate body rather than an individual creator, which obviously determines what they do with objects which have been discovered and presented to them. For the individual who has produced the object – artist, author, photographer, musician – their concern is that they continue to be associated with the object which they have created. To clarify the issue of good faith; there's a conflict of responsibility for all sorts of public service institutions, and the fact that these issues are being discussed demonstrates the deep level of serious concern about rights management by these institutions. They also have a statutory responsibility towards making works of art available for research, and how doing so responsibly impacts on the other. The distinction between this kind of public service and good faith use for copyright material, some of which may be orphaned in other terms, is really quite readily distinguished from all kinds of other potential usages, including individual access. This seems clearly reflected within the proposed US legislation.

However, despite the clear arguments for museums to undertake mass digitisation projects, under US legislation they would not then be allowed to make mugs and t-shirts as a revenue source! Managing the costs of this in terms of infrastructure is a really serious consideration – creating a piece of legislation is a serious and time-consuming work if it is to be a real solution. Currently in the UK, there is no single body mandated to collect rights on behalf of Orphan Works or unpublished works.

Regarding publishing and media usage, newspapers should make it a condition of their consumption of images that all images they use are tagged with the appropriate metadata for contacting the copyright holders, as generally the main criticism leveled against them is their stripping out of this kind of metadata. The work of [PLUS \(Picture Licensing Universal System\)](#) – a system of standards that makes it easier to communicate, understand and manage image rights in all countries) and similar organizations in combating this is incredibly encouraging.

There are other ways in which databases, associations and collecting societies can learn to talk to each other, by creating a culture of use and which is able to be more immediately responsive than a legislative solution.

Assuming a work is defined as an Orphan, the process for de-Orphaning a work needs to be defined, including what constitutes sufficient proof of ownership of a work. This is one of MILE's key tasks associated with the creation of its Orphan Works database.

### **Archives / not-for-profit perspective**

Orphan Works are a serious problem to institutions like the National Archives. Because they deal with a mass of unpublished material, the vast majority of this is Orphan Work material and the chance of ever locating the rights holders of these is minimal. A clear definition of what constitutes an Orphan Work is crucial. The two aspects to an Orphan Work are:

- Remunerative rights;
- Moral rights.

Artists are usually equally concerned with their moral rights as with their remunerative rights.

The ideal UK solution would be an exception which ceases to apply if there is a licence available. Unfortunately legislating such an exception would require legislating at EC level. Therefore, a more practicable alternative would be an exception which allowed use of an Orphan Work unless a licensing scheme covered that particular use, as a licensing scheme would probably not cover all uses. In UK this might be a Collecting Society such as [ACS \(Artists' Collecting Society\)](#), [DACS \(Design and Artists' Copyright Society\)](#) and [CLA \(Copyright Licensing Agency\)](#) and this solution has been suggested by various UK organizations. But even if the user obtains such a licence, unless it is issued by a mandated body such an indemnity is not going to protect the user from being sued by an appearing rights holder and is therefore worthless. It's important also to distinguish that being protected from the costs is a different matter from being sued. Another one of MILE's tasks is to evaluate the suitability of collecting societies for extended licensing model licensing arrangements.

### Commercial perspective

The attribution of works is always interesting for both art historians and important for commercial image libraries as it increases the value of a work. Attaching as much information as possible to an image to get value out of them is a prime concern for commercial image libraries. Such libraries must take their copyright responsibility seriously, and pass this ethos of responsibility onto its clients, who fall into a number of different categories;

- people who are genuinely ignorant;
- people who pretend to be ignorant.

The Bridgeman Art Library provides copyright information on its commercial website, carries out its own Due Diligence in-house, and does publish Orphan Works because it feels it needs to expose them to encourage their owners to come forward. This is a dichotomy, and similar to the museums, commercial libraries face both ways regarding copyright.

Many different types of work fall into the Orphan Works category – pottery, aboriginal art works, book illustrations, paintings, a child's drawing, a sketch on a napkin – which all affects the user's ability to carry out Due Diligence, a concern voiced by the artistic fraternity in the US. And the various different types of use – education, on websites, inside a book, on TV, advertising agencies and designers – are further complicated by complex levels of copyright and reproduction rights. At what point on the levels of rights does a user take the hit?

The one requirement of all the different users across all sectors is speed. But in terms of administrative processes, that's just not practical. Users also need good access, attribution, certainty/safety, and prior knowledge of costs for their budgeting purposes. For example, the BBC has a copyright 'slush' fund, in case any rights holders come forward retrospectively; while this is not an ideal solution, it's a workable provision which the BBC have developed independently. Reasonable compensation fees are important. And a consideration for large commercial libraries is the creation of international, or world, rights. This points towards a mixed-economy approach for a set of solutions, rather than one blanket legislative solution with a series of exceptions.

As already highlighted during Jonathan Band's session, it's proven that newspapers strip out IPTC metadata when accepting images. In addition to this, newspapers also store images without the accompanying metadata and reuse them, thus creating Orphans from images which were not sold to them as Orphans.

## Publishing perspective

Although obviously the main Orphan Works issue for publishers regards textual works, the problem remains the same across all mediums. Plus, to a lesser extent publishers do also deal with artistic works – for example, children’s works are 99% illustration and 1% text. And as with museums and commercial entities, publishers also face both ways, both needing permission to clear rights to reproduce works and also owning rights themselves for works.

Clearing rights is not so much a difficult transaction to process, as very time-consuming. The process can take months and sometimes years, which has to be built into the publishing schedule. Therefore, Orphan Works are one of the holes in this process. As with the perspective from the Archives sector, the publishing sector requires a clear definition of an Orphan Work, and when a work becomes an Orphan Work.

Regarding the two models presented for consideration, Canada’s Copyright Board could be a good body for EU to think about emulating; certainly finding trusted intermediaries within each member state is an important consideration. The UK has a copyright tribunal, but this is expensive, traditionally settling high-level disputes, and may not be the appropriate body to deal with copyright and Orphan Works. The system proposed by the US is brisk and efficient, and the ‘safe harbour’ statutory damages area could be another useful aspect to consider for EC adoption.

The proposed solution for a licensing body is actually in practice in Scandinavia, and extended collective licensing is currently being implemented in Denmark despite the fact that collective licensing agencies are not actually mandated to licence works. In the UK this would of course be conveniently simple to practice, from a political [governmental?] perspective. With one collecting society in each member state, therefore the need to legislate is negated and bodies are already in place to practice this type of licensing, obviating the need for governments to spend time and money putting together such bodies themselves.

MILE’s Orphan Works database is a good opportunity for running a limited pilot to gauge the appropriateness of such a model and to learn lessons while remaining flexible.

There has to be provision for the rights holder who is not only due remuneration, but might also object completely either to the use or the proposed use of their work. The issue of balance remains between the rights of the copyright holder and the rights of the ‘good faith’ user. Genuine ‘good faith’ users of Orphan Work images do need some measure of protection if they can demonstrate that they have followed Due Diligence steps as set out in legislation. Due Diligence is a time-consuming task, but it should be. If it is made totally automated, it risks ceasing to have meaning. And this is an easily quantifiable approach. .

Ultimately this is a problem of data and data management. Currently within publishing, this is scattered across various different organizations. None of the data owned by these bodies is merged, so a friendly and efficient one-stop-shop portal for users is needed. The emphasis needs to focus on *trust*, and the solution/s should represent the interests of *all* users who all need to trust each other. Perhaps each industry sector needs its own practice to reflect their specific needs? Another of MILE’s tasks is to undertake a sector survey and write up each one’s approach. Also within the publishing industry, protocols for rights management are being developed and improved all the time, and the latest is ACAP – Automated Content Access Protocol.

The active concern demonstrated by the EC via projects such as MILE and ARROW is reassuring. But although legislative solutions have been adopted, the risk of a legislative

solution in UK and across Europe would be to freeze-frame an issue which is rapidly developing and moving. The fact that Orphan Works are being created by lack of supplied metadata, or by the removal of existing metadata, means they are not just historical but an ongoing problem. Approved licensing schemes would probably be a healthier and more flexible way to move forward. A trusted organization is needed, like CLA in the UK, who probably hold the majority of this data. They might be the most appropriate body for the UK start with, and would need governmental approval. Equally, a similar body needs to be found or created at EC level.

## Conclusions

There are currently certain bodies in the UK are proposing models along the lines of an insurance model; paying a fee to a collecting society (CS) for them to clear the rights, which is remunerated if the rights holder is not found – minus an administration fee. While this is clearly an advantageous business model for the collecting society concerned, there is the strong suspicion that this is merely a profit-making initiative which will not actually best address the issue. Since the statistics of rights holders actually coming forward to claim is 0.0001%, this heightens the suspicion of commercial exploitation. The bodies with the most data are not always best placed to become the default gatekeepers for clearing rights, and this proposal does not specify how exactly rights holders will be traced. Another real suspicion exists that this CS would take the money while relying on the real work of other organizations who hold copyright information – e.g. TATE, The NPG – so maximizing profit for minimal effort.

IT and technology providers need to embed metadata into images and prevent the creation of future Orphan Works. Camera manufacturers do have metadata built in, but use may not be wide enough. Under current US legislation (specifically the Digital Millennium Copyright Act, as Jonathan Band noted earlier), if users are aware that their applications or systems – such as [SmugMug](#), [Flickr](#), and some server site processors – strip metadata in the process of creating thumbnails, they cannot claim ignorance of this. Deciding exactly which data needs to be embedded is very important, and MILE could address as part of its work. Provision to combat this is being created through a collaboration between PLUS, IPTC and PhotoShop; the next IPTC metadata revision will be out in PhotoShop Series 4 and other applications, containing a number of PLUS fields that will be embedded in the standard IPTC as part of that system, so there will be the facility for the publishers to input a lot of robust metadata regarding all copyright and rights information. So then the responsibility can only lie with the publishers, and MILE will continue to monitor and participate in PLUS's developments in this area.

The US's idea of flagging Orphan Works with a mark like a copyright symbol or a watermark, to signal that the image is an Orphan, is another idea worth considering for the UK.

Trade associations could be given another role to play here in terms of moral rights. One suggestion is that they should approach the large newspaper groups themselves, and BAPLA is already trying to work with newspapers on this point. This piece of legislation does actually exist in UK law, but it is obviously not enforced, which is perhaps why it is also not practiced. There is room for trade organizations to be in dialogue with manufacturers, because although sectors like cultural heritage may not represent the largest consumer demographic of their products, in terms of volume they are the most significant in terms of consumption and profile.

Of course, it is a part of cultural sector institutions business to provide copyright information.

However there is a tendency to perceive the cultural sector as a body of huge and very well-funded organisations, when in fact these are in the minority, and in reality the majority are struggling to keep pace with developments.

While establishing standards is an excellent solution, promoting their use is another issue. Harmonised definitions of terms are also needed on worldwide platforms – e.g. originating from Brussels, the US, Geneva and the UK. Domestic solutions will not suffice. Where individual governments can help is in the abuse of licences by users. Clarity of legal status on this and reinforcement of legal status would be supportive, and provide frameworks for the reinforcement of IP rights.

Many aspects of the problem are fairly easy to resolve, such as that of reasonable remuneration. But then other areas are tricky. A painful period of experimentation, until some more ideal solution can be reached, is to be expected.

The emerging result is that it will be difficult for any member states to present one solution which is capable of answering all the associated implications. The solutions will not be perfect, so it is more a question of testing a series of different solutions – for example, databases such as MILE's – and when these have been established for a while, to then see what the ideal solutions will be. Databases may not work as the sole answer, and the prospect of creating one database of Orphan Work images is a very distant prospect, but it can be a part of the solution, for consultation purposes. There could be portal of several databases – of artists' names and of works, most importantly – to aggregate searches rather than aggregating all the content. For example, the linking together of databases is being done within SPIRE – a project which focuses on geographical data. Making databases compatible is time-consuming, but *interoperability* is the way forward. The HLEG Copyright Sub Group's specific recommendation is for networking existing databases rather than creating one central database. This is where the challenge lies. The problem also remains of The Berne Convention, and the fact that putting works into databases is supposed to be illegal!

Moreover, the EC wants each member state to come up with its own recommendations for legislation within each state, in recognition with each other, but to come up with their own solutions. But each country separately needs to look at the creation of Orphan Works within its boundaries. There will be no blanket solution from the Commission to cover all countries. Therefore, determining the most effective way to aggregate the available knowledge is key, within a European context, to ensure the best use si made of of content, knowledge, interest and funds.

#### **4. Ewelina Śliwińska (LL.M, Legal Advisor, Wardyński & Partners); Orphan Works – a Polish Perspective**

Ewelina Śliwińska gave a brief overview of the legal status of Orphan Works in Poland.

The term 'Orphan Works' is non-existent in Polish law. Polish copyright law was established in 1926; more recently Poland became a signatory to The Berne Convention and now complies to a large extent with legislation in the European Union. Changes within the image industry (mass digitisation etc) have resulted in additional acts to provide a better balance of interests between those of the rights holders and those of the users.

The Polish Copyright Act 1994 legislates that any use of work has to be with the prior consent of a right's holder; the current state of Polish legislation makes legal use of Orphan Works difficult to establish.

There are some exceptions to the above in the form of legal licences:

- The use of encyclopaedias and atlases, with regard to photographic and artistic works.
- The use for educational and scientific purposes, which also provides use in only with regard to detail of or partial fragments of works, and not the whole work.

Licence and reproduction is handled by commercial agencies.

Under Polish law copyright holders have a right to remuneration. In general, the user is responsible for payment but there are some exceptions. The obligation to pay for use goes beyond copyright protection – works which are in the Public Domain are also liable for licence payments, payments are catered for by a special fund. Between 5-8% of the total price for the work is mandated under the Public Domain Payment Doctrine. There is no legal facility, collecting society or otherwise to act on behalf of Orphan Works.

Licence agreements which have been in place for some time do not cover some commercial areas of use which are more up-to-date. Consent would need to be obtained from the original licence provider.

The overly restrictive Polish copyright law and blurred legalities concerning Orphan Works over-complicate mass digitisation.

#### **Questions**

**Q.** Stakeholders were interested to know

- a) How a Creative Commons licence would help and whether governmental legislation of a licence would interfere with freedom of choice?
- b) Whether the Public Domain payment is a tax rather than a payment and how it is paid in relation to fees paid to stakeholders?

**A.** A Creative Commons licence could not be an independent solution. It would need to be combined with legal regulation and framework to create a basis for legal use. A Creative Commons licence could prevent the creation of Orphan Works, if used by authors, as it contributes to identification of author to work and lays out terms and conditions of use of

work. It was suggested that creating Creative Commons licences might be positively linked to emerging legislation.

Polish stakeholders and lawyers who have expressed an opinion believe that Public Domain payment is a hindrance to use. It means paying for works on which copyright has expired, so therefore it's not a rights payment.

## **Conclusions**

An understanding of the ramifications of Orphan Works legislation in Poland is necessary to highlight the challenges facing EU copyright development. MILE's objectives demand a European perspective; whether or not Polish law is robust enough to adopt an approach to Orphan Works is not clear. Due Diligence, as an option, was not discussed. It would be useful to know whether any legal precedent for Due Diligence has been established or whether Due Diligence would be considered a defence in a Polish court of law.

- Collecting Societies could grant licences and collect fees to be given to emerging stakeholders
- Special licences could be created
- Use of Creative Commons licences
- Creating a digital rights management database

There is probably not just one solution, perhaps these could be used together to provide solutions accumulatively.

## **5. Sam Minelli (Head of Research Centre, Alinari 24 ORE); *Creative Content Online: Multi Territory Rights Licensing, the European Commission Regulatory Consultation, and Orphan Works issues***

This paper focused on multi-territory rights licensing (MTRL), one of the key areas from the EC's 2008 Communication on Creative Content Online (CCCO). The CCCO directive was created in order to activate further actions to support the development of innovative business models and the deployment of cross-border delivery of diverse online creative content services. Sam Minelli's presentation explored the results of the responses, focusing in particular on Orphan Works and related issues. Minelli also examines the possibility of one Multi-Territory Rights Licensing structure, focusing on related economic, ethical and legal issues.

The online environment allows content services to be made available across country borders, therefore also permitting different stakeholders to evaluate eventual multi-territory copyright licences. Against this is the issue of Orphan Works; a large volume of creative content which has been made available online but with no copyright or rights information, thus limiting the viable potential generation of new creative content.

The issue of MTRL is a consequence of the fragmentation of rights, not only on a geographic basis, but also between right holders within the same national territory. Would the European creative communities benefit from a large, single legislative market while competing with the rest of the world not bound by limitations? Could the MTRL be general enough and, at the same time, sufficiently user-oriented to be 'fair' and 'representative'? Finally, would an eventual Recommendation take the place of natural market behaviour and upcoming technological innovations? Or would it rule obsolete visions once released?

### **Orphan Works, a Multi-Territory issue**

The issue of Orphan Works affects general public users in basic types of use. For example, if you want your old family photographs to be retouched, repaired or even just reproduced onto a CD, this service could be refused by photo shops because if those photographs were taken by professional photographers, it is they who hold the copyright of the photographs and not the customer. So unless the customer has a written and signed consent from the photographer, both the photo shops and the consumers do not have the right to reproduce photographs, and therefore are unable to retouch or repair old and damaged prints. Equally, other types of users - museums that want to preserve and use images in their archival collections, academics, etc. – would face the same problem.

Minelli states that MTRL might need to address the Orphan Works issue, and outlines the Canadian licence system. This caution is unnecessary – there's no question that Orphan Works would need to be incorporated into any such system. And the same question of 'what constitutes Due Diligence, or a reasonable search?' crops up; and in particular, what constitutes a reasonable search in the digital era? The Gowers' Review of Intellectual Property and the SAA's Metadata Manifesto are cited as evidence of international awareness of the problems surrounding Orphan Work images, but nevertheless, these documents offer no practical solution to the problem.

Minelli's proffered solution is technological; to embed permanent metadata into the digital creations. Currently, standard metadata records, such as EXIF for JPEG compressed images, are often stripped off by broadly used commercial software. Another parallel solution would be via the registration authorities – such as PLUS's proposed development of a system of centralized registries designed to help potential image licencees to locate and contact licensors and copyright owners. But who would manage the eventual authority

registries and solve the upcoming eventual conflicts? The rights of the creator are often overshadowed by those of the commercial sectors. Would this also be an economically sustainable model for small artists and private individuals? And could the artist register each work in a similar way to the patenting process?

Minelli sees a MTRL as having the potential to reform copyright law on an international level, allowing individuals and institutions to use content in ways consistent with the digital age, and looks to Europe to provide the guidelines for a 'reasonable search, as in The Gowers' Review of Intellectual Property:

*“the [European] Patent Office should issue clear guidance on the parameters of a 'reasonable search' for Orphan Works, in consultation with rights holders, collecting societies, rights owners and archives, when an Orphan Works exception comes into being.*

However, of the 12 public authorities who responded to this consultation, most were not in favour of an EU recommendation on MTRL, as different media types require different approaches. The Dutch government position is that the best guarantee for cultural diversity and creativity and for the greatest possible supply of online content would be a binding instrument like a directive. But overall, the general response of international governments is a policy of being reactive, allowing market stakeholders to approach the MTRL issues themselves and then raise their own needs.

## Conclusions

The polarized opinions seem to prevent an eventual EC recommendation for MTRL, given that both sides use the same argument of cultural diversity to sustain their positions. MTRL main limit is intrinsic: the recommendation should at the same time be general (fair) and user oriented (representative of cultural diversity and of different perception of the IPRs). Globalization is the most challenging driver: a MTRL limited to European countries may stimulate piracy and generate jurisdiction conflicts or migration of copyrights towards countries which grant longer IP duration. Furthermore, any MTRL could quickly become obsolete, proposing normative recommendations in a fast-changing, technology-dependent, market-led domain. Although there is a strong demand for pan-European legislation, any eventual MTRL could not be solely limited to EU countries, as the effects would limit the potential of European countries and the rising market potentials. More than Recommendations from the EC, some stakeholders are in favour of EC Directives or supporting the harmonization and improvement of existing international agreements.

Orphan Works constitute a MTRL issue and there's no question that an eventual MTRL regulation would need to address Orphan Works, due to the fact that in most cases Orphan Works are not provided with any information which helps to identify the copyright owners and their localization and consequently would represent a hole in any eventual Recommendation if they are ignored. The most relevant Orphan Works concerns are related to inadequate identification of the information on the copies of the work; limitations of existing copyright ownership information sources; inadequate information about copyright ownership because of a change of ownership or a change in the circumstances of the owner; difficulties in researching copyright information. The overwhelming conclusion is that responses differ from company to company, sector by sector, leading to the conclusion is that a sector by sector MTLs would work best, perhaps in some cases further defining this to region by region – e.g. US, the EC, etc. However, any MTRL could fall down on the issue of Orphan Works, and since these do not appear to be directly catered for the recent recommendations, there's still work to be done on this issue.

## **6. Graham Howard (Design Director, System Simulation): *Launch of The MILE Project's Orphan Works Database and workshop***

Graham Howard presented the audience with a virtual tour of the Orphan Works database sites (*please see Deliverable 4.1 for a description of conceptual schema and <http://orphanworks.ssl.co.uk/> for live version*).

The Orphan Works website is currently being managed by the administrator 'Bridgeman Art Library' (BAL). The website is not limited to BAL administration in perpetuity and there is no practical reason why other stakeholders, could not in the future, submit their own images and moderate the site. Current users make their submissions to BAL via email as jpeg or tiffs, and associated metadata is either placed in headers with the image, or sent as a separate CSV file.

The website consists of two working ends:

- Public-facing site;
- Administration site.

Images and their metadata placed on the public-facing site are available to the public via free text and open searches; the latter brings up the full database. Individual images carry tabbed areas differentiating the various functions. The content of the site is user-created, searching is facilitated by folksonomies. All material supply and production can be controlled. A Due Diligence tracking tool will be needed to facilitate tracking the history of the image's information updates, and there is space for the Diligent search history on the back-end of the site, Recording times and dates within this will attest to the history and will be crucial to forming genuine evidence of Due Diligence.

There are many collections databases held by stakeholders. Submissions of such a large quantity of images in an existing database may be more appropriately facilitated via a web portal rather than a single database. There is no technical reason to prevent the use of a portal. A web portal provides a single function via a web page or site. Web portals often function as a point of access to information on the World Wide Web, as portals present information from diverse sources in a unified way. Aside from the standard search engines, web portals offer other services such as e-mail, news, stock prices and various other features. Portals provide a way for enterprises to provide a consistent look and feel with access control and procedures for multiple applications, which otherwise would have been different entities altogether.

The management of this Orphan Works site as it stands is potentially a costly process. A portal would facilitate a shared burden amongst stakeholders, reducing the administration load for BAL. The advantages of a portal are not only limited to reducing expense in terms of time and money; a portal would facilitate a united public face as opposed to a fragmented approach, with stakeholders offering a single solution to the problem of Orphan Works. This would have a positive impact for dissemination and accessibility, and we are currently looking into the feasibility of introducing a portal.

Users place images on this site at their own risk. Terms and conditions are accessible.

The administrative site is accessed via a log-in. It contains various different options for searching, and the moderator can make decisions about information submitted. Administration will be crucial to the success of this site. Decisions must be made with regards to the marketing.

## Q&A – Graham Howard and the audience

**Q.** There was concern regarding how users would be able to find information about an image. Would an image recognition tool be available?

**SSL.** There is no technical reason why an image recognition tool can not be added.

**Q.** What is the incentive for people to upload? There could be a legal issue here. In the US this could be under Fair Use, but you don't have this in Europe.

**SSL.** Anybody who places images on the website does so at their own risk. The image owners still own their content once the image is on the site.

**Q.** How do you define what an orphan is? Surely you need to define the steps that you have taken to make it so?

**SSL.** System Simulation did not know the answer to this.

**Q.** Cataloguing departments (including BAL) frequently create artists that they don't have copyright information for. Researchers look as far as possible but at some point they have to give up. At what point does a researcher stop looking?

**Q.** The NPG was concerned with the authority of using an Orphan Works database - a 'Google' facility would provide a number of bases for a search, rather than one, 'Google' might be more effective. The NPG questioned MILE's use of the term Orphan Works explaining that the database was a Rights Research Engine and not Orphan Works as they (Orphan Works) were the content, not the process.

**SSL.** System simulation agreed that the Orphan Works database was not a magic bullet. It is not a reference site in that sense. Jonathan Band made the point the 'Google' did not drive the situation in the US whilst others pointed out that 'Google' is sued for copyright infringement.

**Q.** Where does the information go, once it has reached the Orphan Works site?

**SSL.** The natural place would be the image library, or whoever put the image up there in the first place. Then they can control it.

**Q.** The audience wanted to know whether any other image libraries have been recruited and whether the potential number of images for submission had been anticipated.

**SSL.** System Simulation suggested that the system was robust enough to cope with millions of objects. The key is how useable the system is. Orphan Works does not have to be a website, it could be embedded in any image website.

**Q.** The audience wanted to know how the key-wording works and what the incentive was for people to add their works to the database?

**SSL.** The key-wording systems are very flexible.

Mario Bouchard added that, "using folksonomies continued to be a positive experience and that evidence emerging from folksonomies was very useful".

## Conclusion

A written report describing the database and how it will facilitate use of Orphan Works, should be made publicly available. It would be useful to know the most common methods used for searching and adapt the site to aid these methods. Regarding the question of legality, if all reasonable steps and precautions are taken and Due Diligence exercised, defense in a UK court of law will be upheld under current legislation. Currently BAL

administers the information on the back-end of the site, and if the site is developed into a portal, control of administration of images will be given to the image location owners.

The administrators currently have no protocols in place defining what an Orphan Work actually is, establishing a set of steps for Due Diligence, and defining Best Practice in this context. In the event of an Orphan Work being used, protocols such as these would be needed to defend Due Diligence. 'Google' searching alone may be too vulnerable to prosecution. There has been considerable discussion regarding use of the term Orphan Works, with many in the industry suggesting that the term is misleading. For clarity and in the eyes of any legal defense, a decision is needed with regards to what an Orphan Work is and how it is defined.

It may be pre-emptive to document user questions regarding legalities. It will be important to ensure that appropriate checks to prevent problems occurring are carried out. These have not been discussed. Documented evidence of the running of the database including the indication of actions and arrangements that could, if properly implemented, reduce any difficulties found, is needed. It is important that the purpose, limits and abilities of the Orphan Works database are clearly understood by the users.

An Orphan Works database has the potential to make an important contribution to the protection of copyright and to the promotion of those rights providing creators with strong collective representation and a united voice. The establishment of owners will result in benefits in the form of improved revenue streams.

## 7. Conclusions

This seminar was intended to encourage debate on the multi-stranded Orphan Works issue and provide suggestions for future action. It examined the existing legislative solutions in Canada and the proposed US Bills as potential models for the EC to consider for adoption, and also looked at the idea of a Collecting Society solution, as currently in practice in Scandinavia. A representative from The Canadian Copyright Board described the legislative solution currently in practice, while a US lawyer who was instrumental in developing the Bills currently in Congress evaluated the strengths and weaknesses of these Bills. This was useful in that it allowed MILE's partners and delegates the opportunity to hear from experts who shaped the current and proposed international solutions, and to evaluate them for themselves. Different industry perspectives were offered from a strong line-up of UK speakers, each outlining their particular industry needs regarding any Orphan Works solution, and also suggesting potential solutions for consideration. Both the Research & Educational and Publishing & Rights Holders sectors were notably in favour of the Collecting Society approach.

Delegates' reactions to MILE's Orphan Works database were extremely valuable. Throughout the presentations preceding the database's launch, opinion on such a database was evidently divided, with delegates questioning the legality of such a database under The Berne Convention, the practicality of creating such a database as an aggregation of content which is already available, although in disparate and disaggregated form, in addition to the administering of such a system, and the question of where future funding comes from. Crucially, the most important point to arise from the day in terms of this deliverable was the function system for this database; as it stands, it is a database into which data is uploaded. The overall opinion of all delegates and speakers was that this should instead take the form of a portal, an idea which was also suggested by some of MILE's partners when the database was initially discussed at *IPR Frameworks*, IPR seminar 1.

Compared to a database, a portal has several advantages. It is an aggregation of existing databases and searches, rather than a database, which is an aggregation of existing content. Since much existing image content and its metadata is already available online, e.g. on commercial image libraries and cultural heritage institutions websites – a database duplicates information which is already available online. A portal would achieve interoperability by collating all this existing information from its original online source, without duplicating it. A portal is also relatively quick to create and implement. Creating a database is time-consuming, and in this context potentially time-wasting since it is duplicating information. A portal points towards the original content holder's database, rather than duplicating it. Therefore, it is relatively simple to aggregate databases via one portal, rather than to create new databases. With a portal, the responsibility for the content remains with the content owner, thus removing the possibility of contravening The Berne Convention from the portal creators' standpoint. As noted by the panel of speakers, The HLEG Copyright Subgroup's specific recommendation is for networking existing databases rather than creating one central database, which is what a portal achieves.

Regarding legislative solutions to the Orphan Works issue, seeing two different stages in the process of creating and practising such legislation was very interesting. The presentations from Jonathan Band and Mario Bouchard respectively allowed MILE the opportunity to examine this process from both the development and governmental processes in the life of a piece of new legislation, and the end result in practice. This was valuable for evaluating the practicalities of creating, passing and enforcing such legislation, and such a solution certainly seems less attractive when the timescale and costs involved in creating a new law are taken into consideration.

Adoption in full of either the Canadian or the US models was not deemed practicable. Although there are many advantages to the Canadian system – it is safe and thorough – overall it is perceived as cumbersome and expensive in terms of cost, time and work burden. Moreover its success rate to date in terms of numbers and making Orphan Works available to users has not been impressive. Meanwhile, the Bills proposed in the US are currently undergoing voluble criticism from the artistic community, whose main concern is the apparent under-representation of their rights in the Bills as they stand, and, in general, weakening their copyright control. This is subjecting the passing of the Bills to major delays.

However, there are aspects of the Canadian and US models which MILE can consider for recommendation, and these are;

- The ‘Safe Harbour’ exception, to cover use by educational institutions and establishments, cultural heritage institutions and archives;
- The ‘Fair Use’ exception, to cover not-for-profit uses;
- Attaching or embedding an Orphan Works symbol to each Orphan image, to highlight it as such to both users and rights holders.

The collective licensing approach, to be administered by a mandated or non-mandated Collecting Society in each Member State, is perceived as a popular solution. It is certainly easy to see why governments might lean towards such a solution; as shown by the US, the process of creating a piece of legislation on this complex issue is time-consuming, since it must consider both the rights’ holders and the users’ needs equally, in addition to addressing the already complicated Copyright issues within this area. Collecting Societies already exist in most EU Member States, therefore obviating the need for governments to set up such bodies themselves. If each Member States’ Government could easily mandate the Collecting Societies to be responsible for administering whatever legislation is deemed appropriate for Orphan Works, a viable and swift solution could be implemented. However, this again is where the process could potentially be held up, as the process of mandating such organisations to practise this work would require different legislative provisions in each Member State. Still, these would arguably be less than creating a whole new piece of legislation, so it still remains a possible solution in terms of viability and speed of implementation. As gleaned from MILE’s PO, EU governments both at Member State and at EC level do not intend to develop legislative solutions unless there is an empirical necessity. Instead, the EC is relying on Member States to work towards finding their own solutions, and in turn the Member States’ governments are looking towards their industry stakeholders to develop solutions.

While this seminar’s focus shifted from its original description as set out in the DoW, it still achieved the following expected results. It generated many recommendations from partners, speakers and delegates on methodology for the Orphan Works database, as defined in Expected Results<sup>5</sup>. It also provided valuable material for MILE’s evaluation report on attempts to overcome IPR restrictions such as ‘creative commons’ and ‘due diligence’, as defined in ER3. The action points for these results are listed below and have been incorporated into MILE’s work schedule.

MILE has created a list of action points drawn from the various conclusions presented in this seminar, which have been incorporated into its schedule for the next stages of its work;

- Establish a definition of the process for de-orphaning a work;

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<sup>5</sup> Expected Results 3.1, ER5, DoW p.17

- Establish a definition of what constitutes sufficient proof of ownership of rights to a work;
- Evaluate the suitability of collecting societies for extended licensing model / licensing arrangements, as in the Scandinavian model;
- Establish a definition of how a work becomes an Orphan;
- Establish a definition of an Orphan Work;
- Survey each industry sector's suggested approach to solving the Orphan Works issue;
- Develop MILE's Orphan Works database into a portal;
- Evaluate how many institutions or stakeholders' databases are compatible for portal inclusion;
- Monitor the developments of PLUS and similar organisations;
- Determine what MILE's Orphan Works database can legally do under The Berne Convention;
- Establish who should manage any authority registries and resolve conflicts between rights holders and institutions;
- Define which metadata should to be embedded in an Orphan Work;
- Evaluate the 'safe harbour' aspect of the US Bills for consideration by the EU;
- Establish whether Orphan Work images should be flagged with a symbol or other technical mechanism to highlight them as such;
- Create harmonised definitions of all the above terms for an international platform.

These tasks have been added to the work package and MILE will continue to consult with stakeholders to achieve these action points so that the results can be both shown at the final IPR and Metadata seminar, *Future of Image IPR*, and written up in MILE's final report.

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