

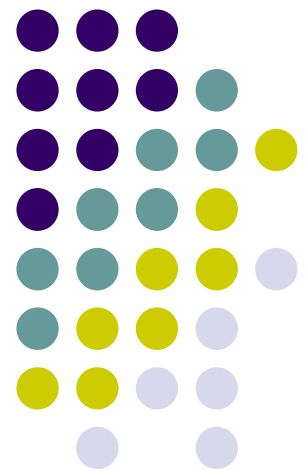
Orphan works

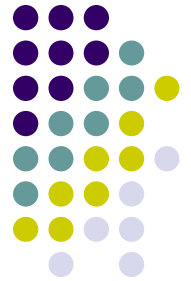
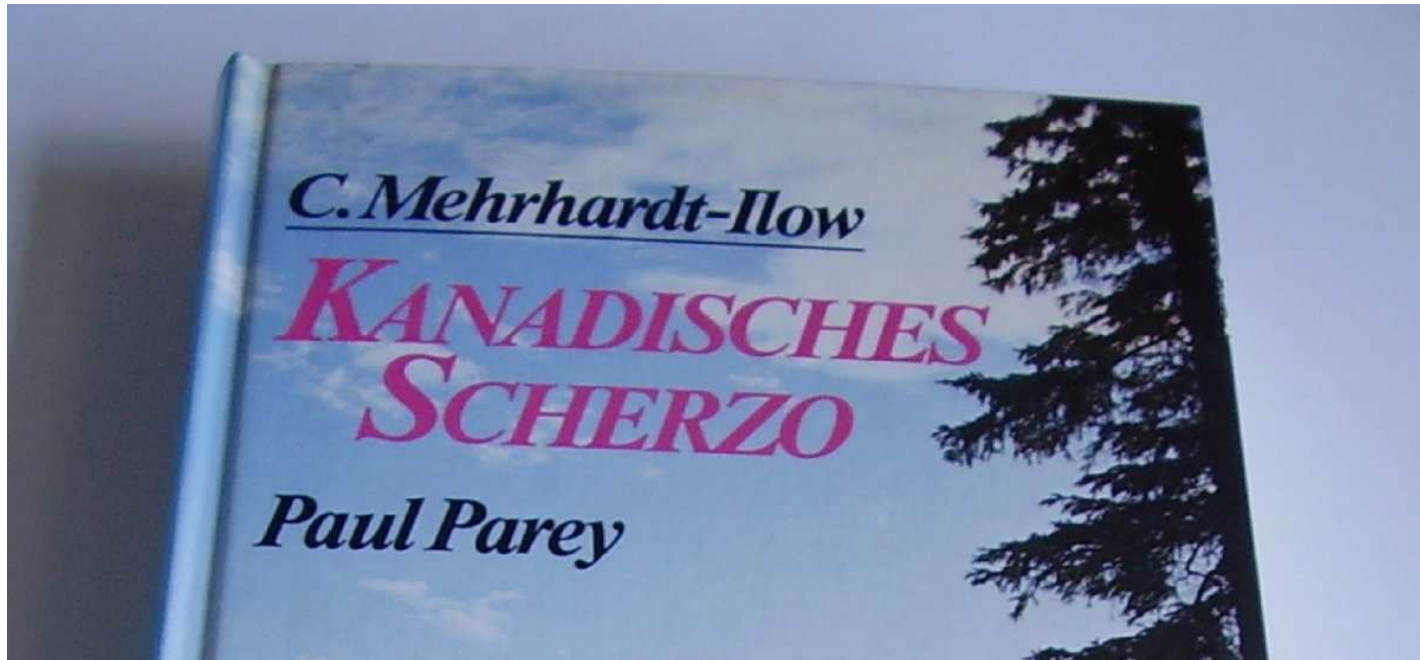
- the new EU directive and its implementation -

eBooks on Demand (EOD) conference

Tartu 6th June 2013

Harald Müller





Term of copyright protection >>> 70 year after death >>> 2004

Person: Mehrhardt-Ilow, Curt

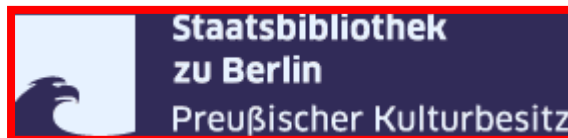
Weitere Namensformen: Ilow, Curt Mehrhardt-
Mehrhardt-Ihlow, C.
Ihlow, C. M.

Geschlecht: männlich

Sachbegriff: Schriftsteller (Beruf, charakteristisch)
Jäger (Beruf)

Biografisch/historische Angaben: Dt. Jäger

Zeit: 1880 - 1933 (Zeit, Lebensdaten)



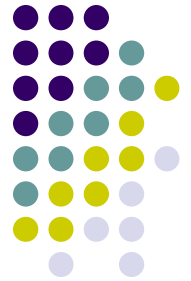
To digitize or not to digitize?

that is the question



Link zu diesem Datensatz	http://d-nb.info/820899518
Titel	In the summertime : a bibliogr. of articles on the Bob Dylan European concerts 1981 / compiled by Michael Lohse and Harald Müller
Person(en)	Lohse, Michael ; Müller, Harald
Verleger	Munich : Hobo-Press
Erscheinungsjahr	1981
Umfang/Format	[15] S., [11] Bl. : Ill. ; 30 cm
ISBN/Einband/Preis	3-923282-01-X spiralgeh. (Pr. nicht mitget.)
Schlagwörter	Dylan, Bob / Bibliographie ; Pressestimmen ; Musikalische Aufführung / Bibliographie ; Bibliographie / Fachbibliographie / Musik → Musikalische Aufführung ; Bibliographie / Fachbibliographie / Musik → Dylan, B.
Sachgruppe(n)	48 Musik ; 03 Nachschlagewerke, Bibliographien ; 06 Publizistik
Frankfurt	Signatur: DKb 82/1658 Bereitstellung in Frankfurt

Copyright & orphan works



1. Copyright harmonisation & libraries
2. EU legislation for orphan works
3. Member state implementation
4. IFLA treaty proposal for WIPO

Autoriõiguse seadus (Estonia)

Gesetz über Urheberrecht (Germany)

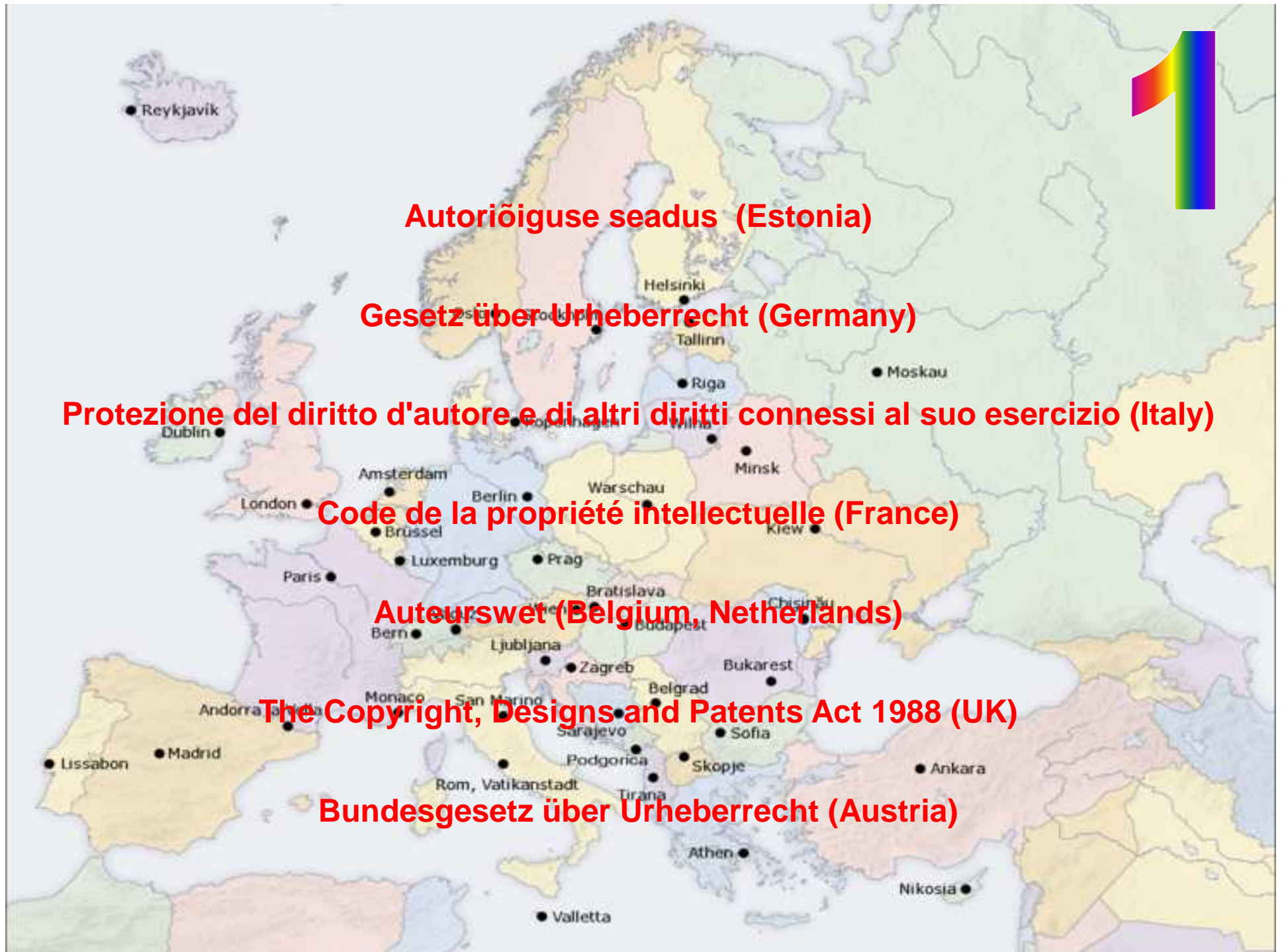
Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Italy)

Code de la propriété intellectuelle (France)

Auteurswet (Belgium, Netherlands)

The Copyright, Designs and Patents Act 1988 (UK)

Bundesgesetz über Urheberrecht (Austria)



DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 22 May 2001
on the harmonisation of certain aspects of copyright and related rights in the information society

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

- (5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

- (6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and

„harmonisation of certain aspects of copyright“



- Just **ONE** mandatory article
- 95% of directive voluntary for EU members
- Copyright law in Europe is splintered in hundreds of different regulations
- ***Transborder*** effect of ***internet*** is **NOT** reflected in any national copyright law

WIPO



E

SCCR/19/8

ORIGINAL: English

DATE: November 5, 2009

WORLD INTELLECTUAL PROPERTY ORGANIZATION

GENEVA

**STANDING COMMITTEE ON COPYRIGHT
AND RELATED RIGHTS**

Nineteenth Session

Geneva, December 14 to 18, 2009

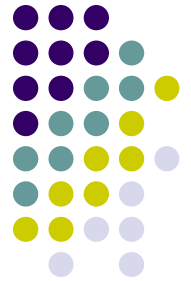
STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS
FOR EDUCATIONAL ACTIVITIES IN NORTH AMERICA, EUROPE, CAUCASUS,
CENTRAL ASIA AND ISRAEL

*Raquel Xalabarder**

Professor of Law

Universitat Oberta de Catalunya (UOC), Barcelona, Spain

Facts & findings on preservation

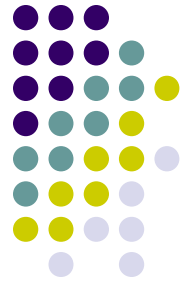


Xalabarder Study 2009, pp. 117-121:

F. Library uses

- Discrimination of **digital** libraries and uses
 - Library exceptions tend to cover only the act of “*reproduction*” (sometimes, analog or digital), but nothing is said as to communication to the public or distribution.
 - Delivering an analog copy to the researcher is not an act of *distribution* to the public.
 - On-line delivery of protected works to the researcher is an act of *communication* to the public.

Facts & findings on preservation



Xalabarder Study 2009, pp. 117-121: F. Library uses

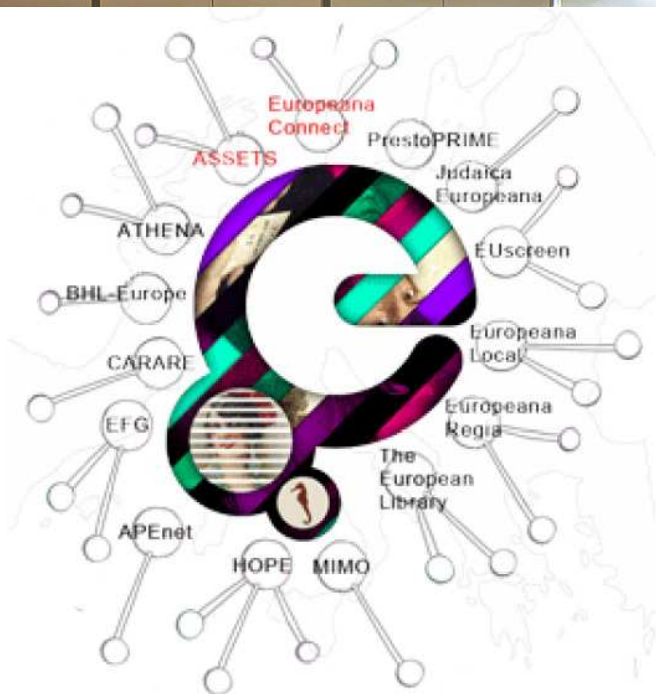
- The **burden** is on the librarian -
 - to check the purpose intended,
 - whether the specific use (preservation) is exempted or not by law,
 - whether a license exists to allow it (or not),
 - decide whether the copy can be made and communicated to the public or not and in what format (digital or paper).
- The **choice** is on the right holder -
 - *the decision as to what digital uses are allowed (and which are not) is ultimately in the hands of the right holders.*
- **National laws fail to fully address the needs of digital libraries.**

Digital libraries

D P
L A



Project Gutenberg



Gallica
BIBLIOTHÈQUE
NUMÉRIQUE



DEUTSCHE DIGITALE BIBLIOTHEK
Kultur und Wissen online

BETA

http://www.ovg.nrw.de/service/bibliothek/bibliothek_aussenansicht.jpg



EUROPEAN COMMISSION
Internal Market and Services DG
Knowledge-based Economy
Copyright

Orphan works



PUBLIC HEARING ON ORPHAN WORKS

Monday, October 26, 2009

Room AB-1B and AB-1D, Albert Borschette Conference Centre, Brussels

9.00 REGISTRATION

9.30 – 10.30 PANEL 1 – ORPHAN WORKS – CHALLENGES AND OPPORTUNITIES

Joanne Yeomans (EBLIDA - European Bureau of Library, Information and Documentation Associations)

Philippe Masseron (CFC - Centre Français du Droit de Copie)

Stuart Dempster (JISC - Joint Information Systems Committee)

Sylvie Fodor (CEPIC - Coordination of European Picture Agencies Press Stock Heritage)

Gerhard Pfennig (EVA – European Visual Artists)

Charlotte Lund Thomsen (IVF – International Video Federation / FIAPF – International Federation of Film Producers Associations)

10.30 – 10.50 COFFEE BREAK

10.50 – 11.30 PANEL 1 – CONTINUED



Orphan works legal options



1. No action

The assumption is that there are not orphan works. If you continue searching, you will eventually find the right holders.

2. Statutory exception

After a diligent search, if the right holders are not found, it could be possible to use the orphan work, without being exposed to liability. Two cases are possible:

2.1 without compensation. Remuneration is done only if the right holder appears.

2.2 compensation to

diligent search

3. Extensive collective licenses (Nordic model)

Based on the legal authorisation that the collecting societies have the rights to represent all the right owners. One of the problems is that, if collecting societies, they get paid any way, they do not have a real interest to search for the right owner.

4. Canadian model:

After a diligent search, the government gives a licence.



DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 25 October 2012****on certain permitted uses of orphan works****(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Commission entitled 'A Digital Agenda for Europe'. This Directive targets the specific problem of the legal determination of orphan work status and its consequences in terms of the permitted users and permitted uses of works or phonograms considered to be orphan works.

- (4) This Directive is without prejudice to specific solutions being developed in the Member States to address larger mass digitisation issues, such as in the case of so-called 'out-of-commerce' works. Such solutions take into account the specificities of different types of content and different users and build upon the consensus of the relevant stakeholders. This approach has also been followed in the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on 20 September 2011 by representatives of European libraries authors

DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain permitted uses of orphan works



Contents

1. Definitions:
 - Orphan works
 - Institutions
 - Objects
2. Diligent search
3. Permitted uses
4. Transborder effect



http://riv.zcache.com/i_dont_want_to_be_an_orphan_so_please_dont_text_tshir-t-r9c28ec5c94244abfa3625b5d7703ca95_f0c6d_216.jpg

DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain permitted uses of orphan works



Article 1

Subject-matter and scope

1. This Directive concerns **certain uses** made of orphan works by publicly accessible **libraries**, educational establishments and **museums**, as well as by **archives**, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions.
2. This Directive applies to:
 - (a) works published in the form of **books, journals, news-papers, magazines** or other writings contained in the collections of publicly accessible **libraries**, educational establishments or **museums** as well as in the collections of **archives** or of film or audio heritage institutions;
 - (b) cinematographic or audiovisual works and phonograms contained in the collections of **publicly accessible** libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions;...

**DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**
on certain permitted uses of orphan works



Article 2

Orphan works

- (1) A work or a phonogram shall be considered an orphan work if **none** of the rightholders in that work or phonogram **is identified** or, even if one or more of them is identified, **none is located** despite a **diligent search** for the rightholders having been carried out and recorded in accordance with Article 3.
- (2) ...

Article 5

End of orphan work status

Member States shall ensure that a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned.

DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain permitted uses of orphan works

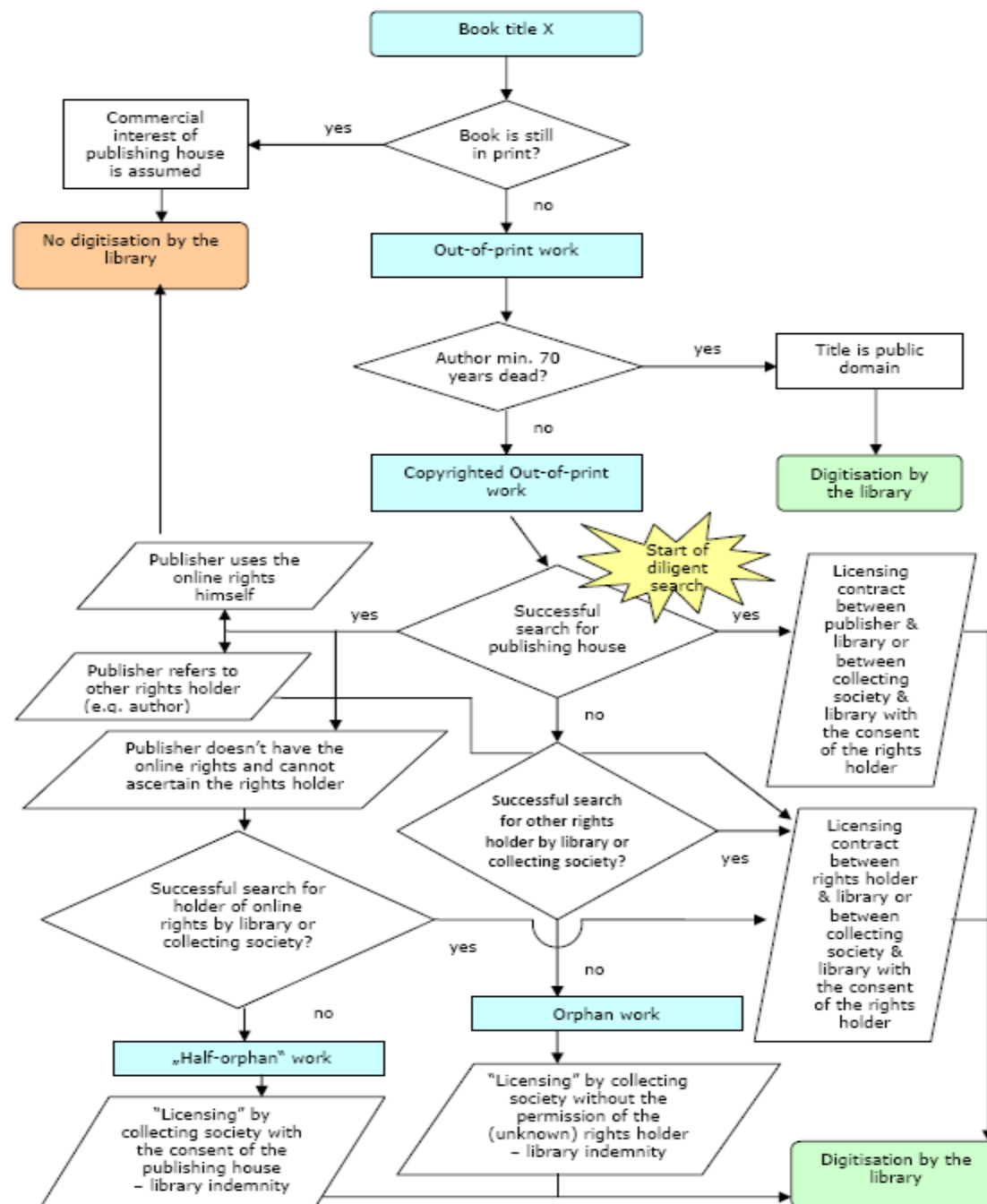


Article 3

Diligent search

1. For the purposes of establishing whether a work or phonogram is an orphan work, the organisations referred to in Article 1(1) shall ensure that a **diligent search** is carried out in good faith in respect of each work or other protected subject-matter, by **consulting the appropriate sources** for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.
2. The sources that are appropriate for each category of works or phonogram in question shall be determined by each Member State, in consultation with rightholders and users, and shall include at least the relevant sources listed in the Annex.
3. A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence.
In the case referred to in Article 1(3), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established.
4. If there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries shall also be consulted.
5. Member States shall ensure that the organisations referred to in Article 1(1) maintain records of their diligent searches and that those organisations provide the following information to the competent national authorities:
 - (a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;
 - (b) the use that the organisations make of orphan works in accordance with this Directive;
 - (c) any change, pursuant to Article 5, of the orphan work status of works and phonograms that the organisations use;
 - (d) the relevant contact information of the organisation concerned.
6. Member States shall take the necessary measures to ensure that the information referred to in paragraph 5 is recorded in a single publicly accessible online database established and managed by the Office for Harmonization in the Internal Market ('the Office') in accordance with Regulation (EU) No 386/2012. To that end, they shall forward that information to the Office without delay upon receiving it from the organisations referred to in Article 1(1).

Figure 1: Proposal for rights clearance on orphan and out-of-print works



Source: Deutsche Nationalbibliothek / VG Wort / Börsenverein des Deutschen Buchhandels

DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain permitted uses of orphan works

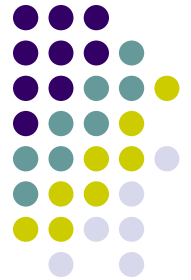


Article 6

Permitted uses of orphan works

1. Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the organisations referred to in Article 1(1) are permitted to use orphan works contained in their collections in the following ways:
 - (a) by making the orphan work **available to the public**, within the meaning of Article 3 of Directive 2001/29/EC;
 - (b) by acts of **reproduction**, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.
2. The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their **public-interest missions**, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public. ...

**DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**
on certain permitted uses of orphan works



Article 4

Mutual recognition of orphan work status

A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be **used** and **accessed** in accordance with this Directive **in all Member States**. This also applies to works and phonograms referred to in Article 2(2) in so far as the rights of the non-identified or non-located rightholders are concerned.

National implementation

3

➔ 05.04.2013 (Germany) Entwurf eines Gesetzes

➔ 24.04.2013 (Czech Republic) Sněmovní tisk 1002/0, část č. 1/6
Novela z. - autorský zákon - EU

<http://www.psp.cz/sqw/text/orig2.sqw?idd=166787>

➔ 00.12.2012 (Austria) Arbeitspapier Urheberrechts-Novelle 2013

<https://netzpolitik.org/wp-upload/UrhNov-Arbeitspapier.pdf%20>

Germany



Deutscher Bundestag

17. Wahlperiode

Drucksache 17/13423

08. 05. 2013

Gesetzentwurf

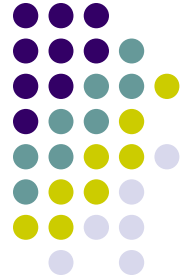
der Bundesregierung

Entwurf eines Gesetzes zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes

A. Problem und Ziel

*Entwurf-Fassung**

Diligent search sources



Quellen einer sorgfältigen Suche

1. für veröffentlichte Bücher:

- a) der Katalog der Deutschen Nationalbibliothek sowie die von Bibliotheken und anderen Institutionen geführten Bibliothekskataloge und Schlagwortlisten;
- b) Informationen der Verleger- und Autorenverbände, insbesondere das Verzeichnis lieferbarer Bücher (VLB);
- c) bestehende Datenbanken und Verzeichnisse, WATCH (Writers, Artists and their Copyright Holders), die ISBN (International Standard Book Number);
- d) die Datenbanken der entsprechenden Verwertungsgesellschaften, insbesondere der mit der Wahrnehmung von Vervielfältigungsrechten betrauten Verwertungsgesellschaften wie die Datenbank der VG Wort;
- e) Quellen, die mehrere Datenbanken und Verzeichnisse zusammenfassen, einschließlich der Gemeinsamen Normdatei (GND), VIAF (Virtual International Authority Files) und ARROW (Accessible Registries of Rights Information and Orphan Works);

2. für Zeitungen, Zeitschriften, Fachzeitschriften und Periodika:

- a) das deutsche ISSN (International Standard Serial Number) – Zentrum für regelmäßige Veröffentlichungen;
- b) Indexe und Kataloge von Bibliotheksbeständen und -sammlungen, insbesondere der Katalog der Deutschen Nationalbibliothek sowie die Zeitschriftendatenbank (ZDB);
- c) Depots amtlich hinterlegter Pflichtexemplare;
- d) Verlegerverbände und Autoren- und Journalistenverbände, insbesondere das Verzeichnis lieferbarer Zeitschriften (VLZ), das Verzeichnis lieferbarer Bücher (VLB), Banger Online, STAMM und presse katalog.de;
- e) die Datenbanken der entsprechenden Verwertungsgesellschaften, einschließlich der mit der Wahrnehmung von Vervielfältigungsrechten betrauten Verwertungsgesellschaften, insbesondere die Datenbank der VG Wort;

3. für visuelle Werke, einschließlich Werken der bildenden Künste, Fotografien, Illustrationen, Design- und Architekturwerken, sowie für deren Entwürfe und für sonstige derartige Werke, die in Büchern, Zeitschriften, Zeitungen und Magazinen oder anderen Werken enthalten sind:

- a) ...;

5. für unveröffentlichte Bestandsinhalte:

- a) aktuelle und ursprüngliche Eigentümer des Werkstücks;
- b) nationale Nachlassverzeichnisse (Zentrale Datenbank Nachlässe und Kalliope);
- c) Findbücher der nationalen Archive;
- d) Bestandsverzeichnisse von Museen;
- e) Auskunftdateien und Telefonbücher.

[About IFLA](#)[Activities and Groups](#)[Publications](#)[Corporate Partners](#)[Membership](#)[News](#)[Annual Conference](#)[Promotion](#)

You are here:

[Home](#) » [Activities and Groups](#) » [Committee on Copyright and other Legal Matters \(CLM\)](#) » [Draft Treaty on Copyright Exceptions and Limitations for Libraries and Archives](#)

[SEARCH](#)[CLM](#)[About this group](#)[News](#)[Events](#)[Publications](#)[Activities](#)[Annual reports & annual meetings](#)[Key Documents](#)[Members](#)[Partners](#)[Position papers](#)[Strategic plans CLM](#)

Draft Treaty on Copyright Exceptions and Limitations for Libraries and Archives

In 2004, Chile recommended that the Standing Committee on Copyright and Related Rights ([SCCR](#)) of the World Intellectual Property Organisation ([WIPO](#)) undertake a review of the current state of exceptions and limitations within the larger realm of intellectual property regimes. This recommendation was adopted by WIPO in 2005, and WIPO subsequently initiated a series of studies on exceptions and limitations in specific sectors.

Particularly relevant to the work of IFLA was the study commissioned by WIPO from Professor Kenneth Crews, "[Study on Limitations and Exceptions for Libraries and Archives](#)," which WIPO published in 2008. The results of this study revealed that numerous Member States had either no exceptions or limitations for libraries and archives in their national copyright legislation, or had only minimal, general provisions.

To examine the issues and what should be done for the benefit of libraries and archives worldwide, in April 2009 IFLA and EIFL convened a workshop at the British Library comprising librarians, intellectual property specialists, the World Blind Union, and

RELATED CONTENT

[Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives](#)

Treaty Proposal on Limitations and Exceptions for Libraries and Archives (Version 4.3 / 05 July 2012)



Article 11

Right to Use of Orphan Works and Materials Protected by Related Rights

- 1) Libraries and archives shall be permitted to reproduce, make available to the public and otherwise use any work, or material protected by related rights, for which the author or other rightholder cannot be identified or located after reasonable inquiry.

- 2) Contracting Parties may provide that, subject to Article 7 of this Treaty, should the author or other rightholder subsequently identify him or herself to the library or archive that used the copyright work or material protected by related rights, he or she shall be entitled to claim equitable remuneration for future use, or require termination of the use.

Article 12

Right to Cross-Border Uses

To the extent that it is necessary for the exercise of a limitation or exception provided for in this Treaty, cross-border uses shall be permitted.

<http://www.ifla.org/en/node/5858>



Conclusion

- Current copyright law puts a lot of obstacles in libraries' ways for digitisation projects
- Discrimination of digital libraries
- Burden is always on the libraries
- **BUT**: there is a light at the end of the tunnel
 - EU Directive for Orphan Works
 - EU member states implementation activities
 - WIPO Treaty Proposal on Limitations and Exceptions for Libraries and Archives
- Main obstacle for libraries: **diligent search**

Diligent search?

THANK YOU VERY MUCH FOR YOUR ATTENTION !