

Taking Care Of Orphan Works – EFG Open Conference on Rights Clearance in European Film Archives

Organized by EYE Film Institute Netherlands and the Association des Cinémathèques Européennes at EYE Film Institute Netherlands, Vondelpark 3, 1071 AA Amsterdam on 30 & 31 May 2011

Minutes Round Table

Panellists:

Thomas Christensen, Curator, DFI (Danish Film Institute)

Jill Cousins, Executive Director, Europeana Foundation

Claudia Dillmann, President, ACE (Association des Cinémathèques Européennes)

Benoît Ginisty, General Delegate, FIAPF (Fédération Internationale des Associations de Producteurs de Films)

Charlotte Lund Thomsen, Director General, IVF (International Video Foundation)

Elisabeth O. Sjaastad, CEO, FERA (Federation of European Film Directors)

Géraldine Vooren, Legal Counsel, EYE Film Institute Netherlands

Moderator:

Emjay Rechsteiner, Curator at EYE Film Institute Netherlands/Filmmaker

Minutes: Emjay Rechsteiner (EYE), Muriëlle van Sante (EYE), Johanna Ruhl (ACE)

The round table participants discuss selected articles of the [Proposal for a Directive on certain permitted uses of orphan works](#), published by the European Commission on 24 May 2011:

Article 1.1 of the Proposal

“This Directive concerns certain uses of orphan works undertaken by publicly accessible libraries, educational establishments or museums as well as by archives, film heritage institutions and public service broadcasting organizations.”

Does this article relate to the film heritage sector, the film archives?

Thomas Christensen replies that some film archives like the Danish Film Institute find themselves playing a double role being both, archive and rights holder. However, he is convinced that this proposal is a step in the right direction. Benoît Ginisty states that FIAPF is concerned whether cinematographic works should be included in the Directive at all.

Are film archives the appropriate bodies to evaluate whether a work is orphan or not?

With the aid of standardized EU-wide guidelines, ACE member archives should be suited to determine the orphan status of cinematographic works. Claudia Dillmann states that it will be difficult to decide who will be in charge of this task in each Member State as some countries have up to 4 member institutions in ACE. Emjay Rechsteiner suggests to have one dedicated institution per Member State instead of a list that each Member State can determine for itself. Charlotte Lund Thomsen confirms that ACE members have been reliable partners of rights holder organisations in the past and that they are the preferred partners in the future.

When dealing with orphan works, Thomas Christensen advises to differentiate between problematic and unproblematic orphan works and suggests to concentrate efforts first on less problematic cases, namely films from the silent era.

Article 2.1 of the Proposal

“A work shall be considered an orphan work if the rightholder in the work is not identified or, even if identified, is not located after a diligent search for the rightholder has been carried out and recorded in accordance with Article 3.”

EYE is an experienced archive in terms of conducting diligent search – is it doable?

Géraldine Vooren who has been clearing rights at EYE for several years confirms that with the sufficient additional manpower it is possible to perform a diligent search for rights holders of cinematographic works. Elisabeth O. Sjaastad confirms this as they too have performed this research. However, Géraldine Vooren adds, that practice has shown that the diligent search guidelines were not written for the purpose of mass digitisation but that EYE has been complying to them in the best possible way. However, the Proposal leaves too much room for the Member States in regard to what can be considered a diligent search.

Article 2.2 of the Proposal

“Where a work has more than one rightholder, and one of the rightholders has been identified and located, that work shall not be considered an orphan work.”

How does this comply to cinematographic works?

Often films are made with the contribution of several different makers. In those cases, it is likely (at least for older films) that the film has more than one right holder. Therefore, cinematographic works may need a different approach than works published in print with regards to orphan status.

Article 3.3 of the Proposal

“A diligent search is required to be carried out only in the Member State of first publication or broadcast.”

What if the country of origin is uncertain?

Thomas Christensen suggests that you need a network to identify a foreign film whose country of origin is uncertain. If it is not possible to determine the country one can always make a risk assessment. Posting a clip online may help to gather information for the identification of the work.

In those cases where the Member State of first fixation of a cinematographic work remains unknown, the ACE member holding the cinematographic work in its archive shall have the option to commence the diligent search and establish whether the work is an orphan work.

Charlotte Lund Thomsen believes that the article is not sufficient in terms of terminology: publication or broadcast is not the appropriate term for audiovisual works. The audiovisual sector should not be included in the Directive.

Article 3.4 of the Proposal

“Member States shall ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database.”

Concerning the registering and exchange of diligent search results, it is discussed whether metadata are intellectual property. For reasons of privacy protection, the results of diligent searches are to be recorded in databases that are partially accessible by the public at large.

Article 6.2 of the Proposal

“However, unless otherwise provided in Article 7, the organisations referred to in Article 1(1) may not use orphan works in order to achieve aims other than their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works contained in their collections.”

What does this mean for audiovisual works (e.g. low res/cultural and educational access)?

Elisabeth O. Sjaastad states that the notion of “public interest” is not well enough defined and that even in educational or cultural contexts rights holders should be remunerated. Charlotte Lund Thomsen thinks that the exception should be subject to the Berne three-step test and regrets that the national legislations still do not address the vital points of the Copyright Directive. The article stating permission for the use of orphaned works in regard to cinematographic works needs a more precise definition, which needs to be the same for all Member States.

According to Claudia Dillmann, the article defines that film heritage institutions are by the definition of the Directive itself able to provide access for cultural and educational purposes in the limits of a publicly funded institution.

Article 7 of the Proposal dealing with authorised uses of orphan works

Referring to uses other than defined in 6.2 it is discussed how rights holders should be remunerated. Thomas Christensen thinks the collecting societies should act on the claims as archives do not want to act as commercial players. It is necessary to create a framework for the paying claims. Furthermore, there is no single (digital) market for audiovisual works. As the exploitation of digital films is difficult, archives are very hesitant to invest public money into digitisation. Making the orphan works available would be a good starting point.

When an archive is making money of an orphan work and a rights holder claims it, what then?

The Dutch model of 'Ximon' as presented by Géraldine Vooren is welcomed by archives and rights holder organisations as a possibility to be compliant with articles 6 and 7 of the Proposal. EYE Film Institute Netherlands performs a diligent search for all rights holders before publishing the films on VoD platform Ximon. A remuneration is predetermined for the producers (or heirs) for the use that has been made of a cinematographic work when the orphan status comes to an end, combined with an extended collective licensing agreement enabling remuneration for other rights holders of that work. Elisabeth O. Sjaastad supports the principle of remuneration for each use.

Article 10 of the Proposal

Should the film heritage sector wait for the next step of the Proposal or should stakeholders come up with PPP themselves?

While ACE welcomes the Proposal as offering legal backing for permitted and authorised uses of orphan works across Europe, rights holder organisations would prefer to settle this matter bilaterally with the film heritage institutions. All round table participants agree that one should reconvene shortly in order to jointly work out further guidelines for the use of orphan works. Claudia Dillmann proposes to start clearing films from the silent era, create a test bed which could provide archives with the experiences that help to identify orphan works. The Directive needs to be tailored more specifically to the needs of audiovisual works. There is also a wish for European rules regarding the remitted revenues.