

## **STM Position**

### **The Use of Orphan Works**

Publishers, like authors and other creators, rely on copyright. Copyright promotes arts, literature and science by vesting creators and their selected agents with exclusive rights. Publishers, however, believe that society and laws require flexibility, and copyright law in particular requires specific exceptions to ordinary liability for use which, in their own way, further the goals of copyright. One such possible exception to liability, known as the “orphan works” issue, have recently been recognized by the United States Copyright Office as worthy of legislation, and similar issues are being raised in the European Union. This position paper is based on a paper prepared by the International Publishers’ Association, and echoes the sentiments expressed therein.

Orphan works are copyrighted works for which the user is unable to identify, locate and/or contact the legitimate holder of the relevant rights (“copyright owner”) for the purpose of obtaining permission to use her/his works. Such “orphan works” risk exclusion from the cycle of creation and exploitation, as copyright compliant users may prefer non-use over the risk of liability for infringement.

To counter this risk, STM strongly supports efforts aimed at enabling the use of orphan works. As both producers of copyrighted works and users of orphan works, we have experience with the issues from both sides, and believe the following should be addressed in any regulative initiative in this area:

#### **1. Reasonably diligent, good faith search for the copyright owner:**

- The potential user of orphan works should be required to conduct a thorough search in good faith, with a view to identifying, locating and/or contacting the copyright owner, prior to using the orphan work.
- The reasonably diligent search should necessitate a high level of care. However worded, the search standard prescribed should require the potential user not only to research the identity/location of the current copyright owner, but also to inform her-/himself about the possible sources where such information could be found.
- Any regulative initiative should refrain from prescribing minimum search steps or information sources to be consulted. Only a flexible approach will ensure an adequate solution dealing with the individual circumstances of each orphan work, as well as rapidly changing information sources and search techniques.
- Stakeholders should be encouraged to develop standards and guidance on what they consider a reasonably diligent search. These must be flexible as resources available change and improve.
- The user of an orphan work should bear the burden of proving that her/his search was reasonably diligent, and must maintain records of his/her efforts to meet that burden.

## **2. Clear and adequate attribution**

The user of orphan works should be required to provide attribution to the copyright owner(s) throughout her/his use of the orphan work as clearly and adequately as possible in the circumstances. For example, where a copyright notice is present in the orphan work, credit should be given in a manner which reflects the notice.

## **3. Adequate remuneration of copyright owner and/or appropriate restitution:**

- Any regulative system should provide that a reappearing copyright owner is to be offered full remedies in an appropriate and reasonable manner, taking into account also the legitimate interests of the user in her/his continued exploitation of the previously orphaned work.
- The appropriate reinstatement of the exclusive rights of the copyright owner should include an entitlement to adequate remuneration for the user's use of the previously orphaned work. Adequate remuneration should generally be defined as the equivalent of a licence fee for the entire use term as it would have been negotiated between copyright owner and user prior to the commencement of the use.
- It is our view that remuneration should be negotiated between the parties, with recourse to the courts where such negotiations fail. Where consistent with local rules, court costs and fee shifting should be available to the prevailing party. For example, if the user offers a fee which the proprietor deems unreasonable, the proprietor should pay legal fees where the Court awards a fee equal to or less than the user's offer, and the user should pay a fee if the Court awards a greater sum.

## **4. Limitation on injunctive relief:**

Any possibility of injunctive relief against the continued and future use of a previously orphaned work should be sufficiently flexible to take into account the efforts and investment made by a good faith user.

## **5. Non-exclusivity of use:**

The use of orphan works is non-exclusive. A user of orphan works can only intervene against further uses of the same orphan work where the further use would infringe her/his new rights in derivative works (e.g. translations, adaptations).

STM's position does not affect the right of copyright owners to ignore or refuse requests for licences for subsequent uses of the orphan works, including derivatives thereof.

## **6. "Orphan work" defined:**

Care needs to be taken to ensure that works that are not "in print" but are still "in copyright" and have identifiable owners are outside of the definition of orphan works.

**STM Copyright Committee**

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