

Orphan Works

In search of an international workable model

D.J.R. Sterenborg



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in search of an international workable model

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So do not leave. Never leave me.

But if you ever disappear, let me find you again

*Dus ga niet weg. Ga nooit bij me weg.
Maar als je ooit verdwijnt, laat mij je dan weer vinden*

Henk Westbroek - Zelfs je naam is mooi

Chapter 1 Introduction

1.1 Introduction

Technological democratization | Thanks to new media and digital technologies, knowledge¹ and creativity can be fostered by those who have access to a personal computer or laptop². Through digitisation and technological democratization³, of which the coming of the internet protocol to the masses has been of major influence, creativity is democratized⁴. Against ever decreasing costs one can create, moderate and publish. In the end according to the motto: *Your greatest creation is the life you lead*⁵, personal websites, blogs are being managed. It belongs to the everyday possible activities of everyone⁶.

There is an increasing digital market known as *The Long Tail*⁷. Commercial enterprises maintain thanks to online advertisements through which millions can provide their living and even offer their clients free services. A vital and succeeded business model: mass communication of otherwise niche-market activity against relatively low costs. Also cultural organizations like to see culture and knowledge available on the World Wide Web⁸.

¹ Thus also FOBID, Netherlands Library Forum, Stichting Auteursrechtbelangen 2008: "In FOBID's view 'digital' is more and more becoming the 'default' for information. Information which is not available digitally is currently almost non-existent. Therefore knowledge organisations increasingly publish their sources digitally, not just new information, but also knowledge and information resources from the past. They see this as an excellent opportunity to revive the past and to reach a larger and wider audience than previously possible in the physical world." Hugenholtz 2008, p. 581: "Wat niet te googelen, op Wikipedia te vinden, via iTunes aan te schaffen of anderszins te downloaden is, bestaat niet." (= What is not available via Google, to be found on Wikipedia, to be bought via iTunes or otherwise to be downloaded, does not exist).

² Van Gompel 2007b, p. 669 (online version, p.1). One Laptop Per Child-project: <<http://laptop.org>>.

³ Hamman 2003, p.2-5. Shi 2008, p. 7-11.

⁴ Lessig 2004, p. 35: "And certainly, nothing like that growth in a democratic technology of expression would have been realized." and p. 184: "This digital 'capturing and sharing' is in part an extension of the capturing and sharing that has always been integral to our culture, and in part it is something new. It is continuous with the Kodak, but it explodes the boundaries of Kodak-like technologies. The technology of digital 'capturing and sharing' promises a world of extraordinarily diverse creativity that can be easily and broadly shared. And as that creativity is applied to democracy, it will enable a broad range of citizens to use technology to express and criticize and contribute to the culture all around." According to Van Kuijk an (inter)national (human)right to internet access exists or should exist: Van Kuijk 2007, p. 71 and 76. Estonia has such a codified constitutional right: § 33 Estonian Public Information Act: "Access to data communication network: Every person shall be afforded the opportunity to have free access to public information through the Internet in public libraries, pursuant to the procedure provided for in the Public Libraries Act (RT I 1998, 103, 1696)".

⁵ This is the tag-line of *Tarnation*, a film by Jonathan Caouette. He could create a documentary movie about his own life with a minimalistic budget of \$ 218,32. By using the freely available Mac iMovie software (<www.apple.com/ilife/imovie/>) he could easily mix photos and 8 milimetres, VHS and answering machines tapes into this movie.

⁶ Grossman 2006.

⁷ Anderson 2004.

⁸ See, amongst others BBC Creative Archive, <<http://creativearchive.bbc.co.uk/>>, INA-Média-Pro, <www.inamediapro.com> and EDL Project, <<http://edlproject.eu/>> and <www.theeuropeanlibrary.org/>.

Copyright & permission | Like Hugenholtz says properly: “The ease with which we can get access to this source, we tend to forget that most ‘content’ available on the web is governed by intellectual property rights.”⁹ Article 1 of the Dutch Copyright Act 1 (hereinafter: DCA):

Copyright is the exclusive right of the author of a literary, scientific or artistic work or his successors in title to communicate that work to the public and to reproduce it, subject to the limitations laid down by law.¹⁰

For the use or modification¹¹ of a copyright¹² protected work one should seek permission from the author and the copyright owner(s) except for the mostly nationally organized limitations. The author because of the *droit moral*, the copyright owner because of economic interests¹³.

Exactly here the copyright romanticized theory about “seeking permission” is about to clash with the practice: Who is the author? Is someone else the copyright owner? How can they be contacted? Are there any legal exceptions/limitations applicable? And do they apply across the border?

Orphan works | The most common term for the phenomenon of the lost author and copyright owner is ‘orphan work’¹⁴. It is usually defined as

a copyright protected work (or subject matter protected by related rights),¹⁵ the right owner of which cannot be identified or located by someone who wants to make use of the work in a manner that requires the right owner’s consent.¹⁶

Actual causes | The democratization of the production of content delivers an enormous amount of copyright protected works. This great number of potential, non-professional authors seems

⁹ Translated from Dutch: “Door het gemak waarmee we toegang tot deze bron kunnen krijgen, vergeten we wel eens dat op de meeste ‘content’ die op het web beschikbaar is, rechten van intellectuele eigendom rusten.”, Hugenholtz 2008, p. 581.

¹⁰ The Dutch Copyright Act is used in this publication since the first publication was addressed to Dutch copyright practitioners. Translated from Dutch. This counts equally for neighbouring and database rights: art. 2 Neighbouring Rights Act, art. 2 Database Act. To increase the readability of this text hereinafter (saving necessary exceptions) I refer to only copyright protection.

¹¹ Copying includes copying in derived formats, such as translations, musical compositions, filmings and other adaptation that continue as independent work, undiminished the rights of the original (art. 10(2) DCA).

¹² Including protection by neighbouring rights or database rights.

¹³ More about this: paragraphs 2.2.3 Authors, moral rights and 2.2.4 Copyright owner, economic rights.

¹⁴ Khong includes the so-called ‘abandonware’, works that are abandoned by the copyright owner. Five ‘uncertain situations’ are analysed: commercial abandonment, strategic abandonment, temporary abandonment, unknown ownership, and unlocatable ownership. Khong 2007, original, digital version used, p.4-6.

¹⁵ *Ibid.* chapter 1 note 12.

¹⁶ Van Gompel 2007b, p. 671, online version, p. 3. The definition is looked after more closely in

to enlarge the level of difficulty of a search. However also getting things ‘out of their context’ or ‘citing available data wrongly’ makes a work anonymous¹⁷:

- (1) inadequate identifying information on a copy of the work itself;
- (2) inadequate information about copyright ownership because of a change of ownership or a change in the circumstances of the owner;
- (3) limitations of existing copyright ownership information sources; and
- (4) difficulties researching copyright information.¹⁸

1.2 Copyright ratio and *orphan works*

Arguments in favour of copyright, are equally used for pleadings of the legal use of *orphan works*. Hugenholtz enumerates the five most important arguments in favour of copyright¹⁹:

- a) The ‘personality’ argument: the work of authorship bears the personal imprint of its maker; copyright (‘author’s right’) is a species of a right of personality.
- b) The ‘natural law’ rationale: copyright reflects notions of natural justice. “Author’s rights are not created by law but always existed in the legal consciousness of man”²⁰.
- c) Economic arguments: copyright protection promotes economic efficiency, by optimizing the allocation of scarce resources through the pricing system.
- d) Social and cultural rationales: copyright acts as an incentive to create and disseminate works that serve a valuable social or cultural purpose.
- e) The freedom of expression rationale: copyright makes creators independent of Maecenas, State or subsidy; copyright is the proverbial ‘engine of free expression’.

Especially the social-cultural *rationale* is used to permit the use of *orphan works*. The most heard economic argument is that an *orphan work’s* economic value is close to nothing and therefore use should be permitted. Moreover the goal of copyright is “to promote progress of science”²¹, or at least invest in it. The situation of *orphan works* discourages creativity, no derivative works are being created²². In the case of old movies, the data carrier (celluloid)

¹⁷ Library of Congress a.o. 2008, part 2.3.23. WIPO/Crews 2008, p. 16, note 11 (WIPO SCCR/17/2): “Orphan works can exist for many reasons, ranging from the simple omission of the name of an author or owner, to the often inherently informal, collaborative, and amorphous nature of blogs and wikis.”. Digitization of (a part of) an analogue work, get a photograph out of the context of a website or not copying metadata by using the printscreen button.

¹⁸ US Copyright Office 2006, p. 2.

¹⁹ Hugenholtz 2000, p. 1.

²⁰ Ploman & Clark Hamilton 1980, p. 13.

²¹ Reichman, Dinwoodie, Samuelson 2001, p. 1036.

²² Brito & Dooling 2006, p.84-85. Specifically computer software is aged fastly and not commercially available, both Khong 2007 and Reichman, Dinwoodie, Samuelson 2007, p. 1036 recall the situation.

simply dissolves over time²³. To prevent the loss of cultural valuable works, to foster the knowledge economy into the next level and to stimulate (technological) progress, copyright should facilitate the use of *orphan works*²⁴.

1.3 Legal causes

In literature references to the legal causes for the emergence of the orphan works situation are based on: the prohibition of formalities, the copyright term extension, the complex legislation and (lack of) copyright contract law.

Prohibition of formalities | Firstly, in literature (mostly American)²⁵ the abolition of formalities for the creation of a copyright is quickly referred to as primary legal cause for works becoming orphaned²⁶. Previously a system in which mandatory registration and a regular renewal was in force, it required registration for the existence, maintenance and the ability to exercise the copyright,. Due to the unconditional creation and possibility to exercise the copyright, the problem may arise.

Copyright term extension | Secondly, the extension of copyright terms (uncoordinated by any international body) causes problems for the search of authors and copyright owners, more about this in paragraph 2.2.2 Copyright term.

Complex copyright regulation | Thirdly, complex regulation that surrounds copyright causes a lot of trouble²⁷. Each and every country has it's own copyright laws that articulates what is subject to copyright laws, which actions are excepted from the copyright law scope, who is an original author, etc.. About this issue of complexity Litman has written down a beautiful and carefully articulated vision: the origin of unclear and often incomprehensible copyright laws²⁸.

Copyright contract law | Fourthly, copyright contract law²⁹ causes many difficulties. Apart from the third cause, complexity copyright regulation, since it's mainly based on general laws.

²³ CSDP 2005a, p. 2. Gowers 2006, p. 65: "It is cheaper to digitise films when they are still in a good condition than to wait until they are out of copyright to digitise and restore them." (4.82).

²⁴ Geiger a.o. 2008, online version, p. 1: "The ever-increasing pace of technological development has prompted a fundamental change in the function and effectiveness of copyright law. The evolution of new business models has led to a dramatic shift in priorities."

²⁵ Section 203 US law, for the 'renewal' provisions of the act of 1909. Troll Covey 2005, p. 122. Van Gompel 2007b, online version, p. 4. The value of registration is elaborated in Alton-Scheidl, Benso, Springer 2008.

²⁶ Art. 5(2) Bern Convention (hereinafter: BC), 9(1) TRIPs Agreement (hereinafter: TRIPs), 1(4) WIPO Copyright Treaty (hereinafter: WCT), 20 WIPO Performances and Phonograms Treaty (hereinafter: WPPT).

²⁷ Seignette 1998, paragraph 3.3.1. Van Gompel 2007b, online version, p. 5.

²⁸ Litman 2000.

²⁹ This definition is derived from Guibault & Hugenholtz 2004.

Copyright can be transferred (non-exclusively) several times. Around a copyright river delta many transactions may be required to transfer the rights of one work. A void in a contract may cause severe misunderstandings or unclearness about the actual copyright owner. Formal requirements around the (many forms of) transfer and the license conditions may be interpreted differently³⁰. This may cause difficulties for the rights clearance process or the exercise of the copyrights. The legal causes of the *orphan works* seem to expose a fundamental problem of the copyright system³¹.

1.4 Outline of this publication

Retrodigitalization, the digitization of existing works³², led to a debate on legislation in many places. It is important that legislative decisions are made considering the interests of authors³³, copyright owners, collective management organisations, users as well as end-users³⁴ also in an international situation.

The aim of this publication is to see how measures regarding orphan works will develop internationally³⁵. To what extent are measures, models or legislation around the *orphan works* situation (legally) viable at an international level?

To find out, subsequently these chapters will deal with: in Chapter 2 an extended definition of the problem is drafted. In Chapter 3 a framework is being drafted for a successful workable international instrument, in Chapter 4 management possibilities, contractual models as well as

³⁰ Koelman 1998, p. 88-160.

³¹ Troll Covey 2005, p. 139: "There is a ground swell afoot that demonstrates strong dissatisfaction with current copyright law and practice. The problem is clearly bigger than *orphan works*. Nevertheless Congress should be commended for requesting an investigation and the Copyright Office commended for their public call for comments. I can't help hoping that this investigation opened Pandora's Box".

³² The definition 'retrodigitalization' is derived from Spindler & Heckmann 2008. Van Gompel 2007b, online version, p. 1 "new, sometimes profitable, secondary or derivative uses.". See also Hugenholtz & De Kroon 2000, p. 16.

³³ Art. 1 DCA *droit moral* (see chapter 2.2.3 Authors, moral rights). CSDP 2005a, p. 5: "Ironically, in fact, undiscovered copyright owners of orphan works would actually be better off if the bonds of copyright were loosened slightly."

³⁴ Appealing to the freedom of information (art. 10 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR)): "This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

³⁵ Elferink & Ringnalda 2009, p. 137: "Hoe kan de digitale ontsluiting van verweesde werken via internet in het buitenland gewaarborgd worden? Via internet zijn werken immers in andere landen raadpleegbaar. Een nationale regeling voor verweesde werken ziet echter alleen op exploitatie binnen dat land en biedt de gebruiker dus geen oplossing voor de exploitatie die over de grens plaatsvindt; het nationale and daarmee territoriale karakter van het auteursrecht brengt dat nu eenmaal met zich mee." (= How can unlocking the orphan works digitally via the internet be secured across the borders? Via internet works are indeed accessible in other countries. A national regulation on orphan works is only dealing with exploitation within that one country and does not offer the user a solution to the cross border exploitation; the national and along with that the territorial effect of copyright laws is entailed.). And WIPO SCCR 17/4/2008, Annex, p. 2: "The European Community and its Member States believe that an exchange of information on this important topic at the international level would be a very useful exercise, and especially meaningful in the cross-border effects of digitisation activities."

legal solutions are being discussed and reviewed in the light of the drafted test. In Chapter 5 recent developments are being viewed. Chapter 6 concludes which measures are realistic and internationally viable for implementation to solve the *orphan works* situation.

Summary

The use of a work subject to copyright protection requires permission of the author(s) and/or right holder(s), but what if necessary information is not available? E.g. when an author/right holder is unknown? Many practical issues are about how to contact these: how can correct personal data be found from an author with a common name? And what if the author can be found, but the right holder can not be? Works that are subject to copyright protection but of which the author can not be traced nor contacted, is the issue of the so-called 'orphan works'.

In the time of a globalized world wide (web) market, cross border situation often occur. From article 5 of the Bern Convention copyrights are protected according to the national laws of the Member of that Convention.

This publication analyses management measures and contractual models as well as legal solutions for this emerging and world wide situation. The test framework takes into account the exercise of moral and economic rights, the sufficiency of legal certainty, flexibility and the costs for the possible users, the number of participants that are involved with the rights clearance process, and if legal changes and recognition are needed and feasible. Finally the developments in how is dealt with the situation are presented.

This publication is a translation of a Dutch thesis, the original was written and published for obtaining the Masters of Law Degree by Daniël Sterenberg (info@djrstereborg.eu).



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