



UNION INTERNATIONALE DES EDITEURS
INTERNATIONALE VERLEGER - UNION

INTERNATIONAL PUBLISHERS ASSOCIATION
UNION INTERNACIONAL DE EDITORES

Position of the International Publishers' Association (IPA)

The Use of Orphan Works

Publishers, just like those of authors and other creators, rely on copyright: copyright rewards creators with exclusive, but tradable, rights, whilst its limitations ensure that others, creators as well as other users, can use and incorporate works in further creative efforts. Whilst the principles of copyright hold strong, it is important to ensure that they be adapted to special circumstances where necessary.

Sometimes, it is impossible 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 constituted by creation and exploitation, as users risk liability for copyright infringement.

To counter this risk, IPA strongly supports efforts aimed at enabling the use of orphan works, provided the issues outlined below are addressed in any regulative initiative in this area:

1. Reasonably diligent search for the copyright owner:

- The potential user of orphan works should be required to conduct vigorous and 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 very 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 did comply with the high standard prescribed.

2. Clear and adequate attribution

The user of orphan works should be required to provide clear and adequate attribution to the copyright owner(s) throughout her/his use of the orphan work. Whether or not an attribution is clear and adequate should depend on the individual circumstances of each case.

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

- Any regulative system should provide that a reappearing copyright owner is to be reinstated in an appropriate and reasonable manner as the actual rightsholder, 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 copyright owner as actual rightsholder 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 for the regulating body to decide how to ensure the adequate remuneration of the copyright owner (e.g. individual contingency provisions by the user in accordance with general accounting practice, an *ex ante* licensing mechanism administered by a government body or collective rights management organisation, or a compulsory user-funded escrow account).

4. Limitation on injunctive relief:

Where injunctive relief is available against the continued and future use of a previously orphaned work, any regulative system should ensure that such injunctive relief is sufficiently flexible to take into account the creative efforts and investment made by the user in good faith.

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).

IPA's position does not affect the right of copyright owners to ignore or refuse requests for licences. It also should not be seen to affect the existing legal framework regarding the duration of copyright, the scope of copyright liability or the applicability of exceptions or defences to infringement.

International Publishers' Association

Copyright Committee

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About IPA:

The International Publishers Association (IPA) is the international federation of trade associations representing book and journal publishers worldwide. Established in Paris in 1896, it now represents 78 national, regional and specialised publishers associations from 66 countries. IPA's main goals are to develop and defend copyright, to promote freedom of expression and freedom to publish, as well as literacy and reading. IPA is an accredited non-governmental organisation enjoying observer status to United Nations organisations, including United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Intellectual Property Organisation (WIPO).