

# Kluwer Copyright Blog

## Will out-of-commerce books soon be managed by a collective management society in France?

Catherine Jasserand (Institute for Information Law (IViR)) · Tuesday, December 6th, 2011



A new proposal of law on the digital exploitation of (commercially) unavailable books of the 20th Century (*proposition de loi relative à l'exploitation numérique des livres indisponibles du XX<sup>e</sup> siècle*) has been introduced quasi-simultaneously in the [Senate](#) and in the [National Assembly](#).

According to the preamble of the proposal, about 500 000 books published during the 20th Century are out of print (for commercial and economic reasons) and only available in libraries. To ensure their dissemination, their digitisation becomes necessary. However, a major uncertainty subsists concerning their copyright status and ownership. Most of the publishing contracts, which are granting rights of exploitation to the publishers, do not contain any provisions on the digital exploitation of books. At least this is the case for books published before December 31, 2000. The draft law proposes therefore to target these books and to set up a mandatory collective management society to manage their digital exploitation.

The proposal, which has not been discussed yet in the Senate and in the National Assembly, already raises several issues. First of all, the introduction of the same text almost at the same time in the two chambers of the Parliament shows a strong political will to quickly adopt the law. Second, the title of law only refers to “unavailable books” (understood as commercially unavailable thus out-of-commerce) and not to orphan works. Orphan works are works that are still protected by copyright but whose authors cannot be identified or located (after a diligent search). Most of out-of-commerce books are orphan works. However, by avoiding any reference to orphan works, the proposal does not deal with the delicate definition and classification of orphan works (including the level of search necessary to identify the right holder). The proposal clearly ignores this issue, although the Commission has recently proposed a [Directive](#) on certain permitted uses of orphan works (for more references, see the [post](#) written by Stef van Gompel).

The legal mechanism set up by the proposal is rather complex. The draft law first defines the category of “unavailable books” and describes how the collective management society will authorise the digital reproduction and making available of the works. Following Article 1, “unavailable books” are books commercially unavailable in a lawful manner, on paper or in digital format, published before December 31, 2000 and registered in a public database specifically

dedicated to “unavailable books”. The proposal creates both the public database and the body in charge of registering these “unavailable books”. 6 months after the registration, the collective management society will be able to deliver licences for digital exploitation. Authors and publishers will only have 6 months from the registration of the work in the public database to oppose the collective management. In case the publisher would oppose, he would have to commercially exploit the work within two years. In the absence of opposition within the 6 months after the registration, the collective management society can grant to the publisher an exclusive licence of digital exploitation for a period of 10 years (implicitly renewable). Within two months, the publisher will have to accept the licence. Otherwise, anyone else will be able to request a non-exclusive licence for a period of 5 years. Finally both the author and publisher will have to jointly request the removal of the book from the public database in case they want to exploit it. However, the deletion from the public database will not annul the licences already granted.

The proposed mechanism is lacking guarantees for authors. They will have a very short period of time to oppose any collective management of their works and will not be able to request on their own the removal of their work from the public database. In addition, the proposal does not request to identify or locate the author before registering the book in the public database. This is logical since the notion of “orphan books” is absent from the proposal, although out-of-commerce are often orphan books. To the opposite, the proposal seems to protect publishers by granting them an exclusive licence to digitally exploit the works. Finally the [libraries](#), which are holding most of the out-of-commerce books, are not particularly favoured since they will not be able to freely use the books but instead be subject to a licence to digitally exploit them. This proposal of law, which has already generated many comments, will hopefully provoke intensive debates in the two chambers.

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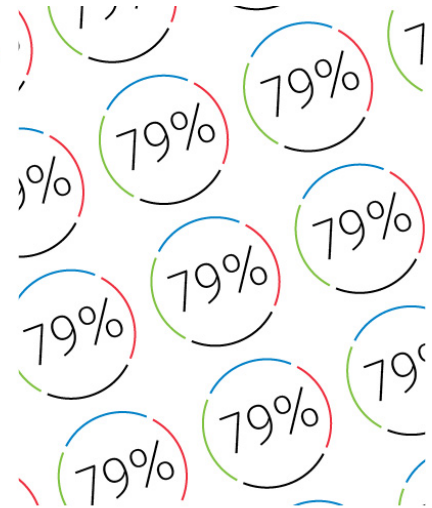
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