

France solves its XXe century book problem!

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Without much noise, France recently adopted Act Nr. 2012-287 of 1st March 2012 relating to the digital exploitation of unavailable books of the 20th century. Contrary to past initiatives from the French lawmaker, the Act does not relate to orphan works, but rather to out-of-commerce works. Or, more precisely: books.

According to the explanatory memorandum to the Proposal, France is the first country in the world to put in place a modern and efficient mechanism to regulate the use of unavailable works, which forms today's biggest obstacle to the digitization of cultural heritage. The French solution is presented as offering a response to the rejected Google settlement in the United States.

What the explanatory memorandum omits to mention, however, is that if this piece of legislation could see the light so quickly it is mainly because the main stakeholders had adopted a [Memorandum of Understanding](#) on the subject one month before the introduction of the Proposal on October 21, 2011. Thanks to the negotiations that took place under the auspices of the European Commission in the context of the MoU between representatives of rights holders and users respectively, most hurdles had been cleared away for the benefit of the French legislator.

The French system rests on two elements: 1) the creation of a database managed by the French National Library where the unavailable status of books can be registered; and 2) the mandatory collective administration of rights, where a work registered in the database can be reproduced and made available on a non-exclusive basis for a renewable period of five years provided that remuneration is paid to the rights owner.

Anyone can ask the National Library to inscribe an unavailable work published in France before 1st January 2001 in the database. A work is unavailable if it is no longer the object of a commercial distribution and if it is not currently the object of a publication either in print or digital. When a work has been registered in the database for a period longer than six months, the right to authorize the reproduction and making available of this work will be exercised by the collective rights management society to be designated by decree by the Culture minister.

The mandatory collective administration of rights is not uncommon in France: the rights of cable retransmission (based on the requirements of the Cable and Satellite Directive), the public lending right and the right of reproduction by means of reprography are also exercised in this fashion. As in the case of these other rights, the right to use an unavailable work is managed by an accredited collecting society, according to the good governance rules laid down in the Intellectual Property Code.

The collecting society in charge of these rights is obliged under the Act to take appropriate measures to identify and locate the rights holders in order to distribute the remuneration perceived, as well as to adopt measures to safeguard the legitimate interests of the rights holders non party to the publishing contract. The society must render account on an annual basis on these points and other aspects of its management to the competent supervisory commission.

The author of a book that has been put on the list can opt-out of this mandatory collective administration of rights system within six months of the inscription of the book in the register. Such opposition is mentioned in the register. After this period of six months, the author can only object to the use on the ground that it would affect his/her honour or reputation. The publisher can opt-out as well, but he is then obliged to proceed to the exploitation of the work within a period of two years from the date of notification of the opt-out. Failure to do so revives the collective society's right to grant permissions of use.

If neither the author or the publisher has opted-out of the system, the collective society must give the publisher who owns the right of reproduction a right of first refusal to proceed to the exploitation of the work. The publisher has then two months to notify in writing his acceptance of the proposal to the society. Silence equals refusal. If accepted, the proposal is granted on an exclusive basis for a renewable period of ten years. This mention also appears in the register. The author of the book can oppose this decision by proving that he/she is the sole owner of the rights on the book. In the absence of such an opposition, the publisher has three years to proceed with the exploitation of the work. Failure to exploit revives the society's right to grant permission of use.

The Act also provides that the author and the publisher can at any time jointly withdraw from the system. The publisher must exploit the work within 18 months of the notification. The author can also withdraw on his/her own if he/she can establish that he/she is the sole owner of the rights on the book. The author has no obligation to exploit.

The collective society may grant publicly accessible libraries a remuneration free permission to use an unavailable work if no rights owner could be traced within a period of ten years from the date of the first authorization to exploit. Such authorization is granted provided that the institution pursues no commercial or economic advantage. However, a rights owner may come forward at any time and request the end of this gratuitous authorization.

Article 2 of the final version of the Act addresses the issue of orphan works by defining a work as orphan when it its owner cannot be identified or found despite a diligent and serious search. The provision further adds that where a work has more than one author, the work is not to be considered orphan if one of the authors can be identified and located. This statement in the French Act on a very thorny issue is likely to influence the debate at the European level in the context of the Proposed Directive on the use of orphan works. Finally, article 3 encourages all stakeholders concerned to undertake a dialogue on the economic and legal issues related to printing books on demand.

Note that the practical details of this Act will have to be worked out in a government decree.