The Orphan Works Chimera and How to Defeat It
A View From Across the Atlantic
Introducing the Chimera

- Lion’s head: mass-digitization projects.
- Snake’s head: transformative and derivative uses.
- Goat’s head: small-scale impermanent/ephemeral uses.
Mass-digitization & reutilization [lion]

- Orphan works: considerable legal uncertainty.
  - Monetary relief: damages may add up.
    - EU: actual damages: moderate.
    - US: statutory damages: high (wilful infringement).
  - Injunctive relief: not a significant problem.
- Part of bigger problem of rights clearance.
- Solution: collective licensing (e.g. ECL).
Transformative/derivative use [snake]

- Orphan works: high legal uncertainty.
  - Monetary relief: EU moderate / US high.
  - Injunctive relief: enormous problem!
    - Removing an orphan work from a transformative or derivative work can render the entire work valueless.

- Solution: statutory license (or specific exception or limitation) subject to a reasonable search.
Impermanent/ephemeral use [goat]

- Orphan works: (moderate) legal uncertainty.
  - Risk is limited to monetary damages.
  - Injunctive relief is not a real problem.
- EU (moderate damages): practical solution.
- US: statutory model aimed at limiting monetary damages for copyright infringement.
Conclusion

- No ‘one size fits all’-solution!
- Different models for different manifestations of the orphan works problem:
  - Large-scale uses (mass-digitization projects).
  - Small-scale uses.
    - Injunctive relief.
    - Monetary relief.