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Committee on Culture and Education

2011/0136(COD)

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DRAFT OPINION

of the Committee on Culture and Education

for the Committee on Legal Affairs

on the proposal for a directive of the European Parliament and of the Council
on certain permitted uses of orphan works
(COM(2011)0289 – C7-0138/2011 – 2011/0136(COD))

Rapporteur: Sabine Verheyen

PA_Legam

SHORT JUSTIFICATION

Background:

The European Union has an exceptionally rich cultural heritage. Much of this heritage, however, lies unused in the archives and libraries of the Member States and is inaccessible to the people of Europe. In order to maintain the diversity of European culture, it is essential to make these works available across borders.

At present only on their respective national territories are EU Member States able to digitise works where the rightholder cannot be identified. In future, new legislation will make it possible to have Europe-wide online access to such orphan works.

The European Commission's Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works provides a basis governing books, newspapers, journals, films, musical works, TV productions etc., which are in fact covered by copyright, but for which the rightholder cannot be identified.

The rapporteur considers the following points to be particularly important:

Objectives:

If a work proves to be an orphan work, it can be digitised and therefore made available to the public throughout Europe.

Through publication via the internet or other distribution channels, Europe's cultural variety will be strongly promoted and become accessible to everyone. This will benefit not only museums, libraries, broadcasting organisations, archives, universities and similar educational or scientific establishments. Private individuals, too, will profit greatly from the provision of digital access to orphan works.

The digitisation of orphan works is a central component of conserving the European Union's cultural heritage, since the Directive allows citizens of the Member States cross-border access to orphan works which is backed up by the law.

Requests:

A work should be considered as an orphan work until all of its rightholders can be identified. However, care should be taken to ensure that the claims of known rightholders are not adversely affected.

In order to establish whether a work is an orphan work, a diligent search has to be carried out. This involves costly research carried out at the highest technical and scientific level.

Broadcasting organisations usually have extremely short-term search enquiries on the topics of the day and due to limits on time would not be able to carry out adequate research. Small museums, archives and institutes do not always have the appropriate resources in terms of both staff and infrastructure and for this reason would sometimes be unable to carry out a diligent search.

It is therefore absolutely essential to integrate collecting societies into the process. These should be authorised to carry out a diligent search at any time whenever an archive, a museum, a broadcasting organisation etc. is unable to undertake this task.

Collecting societies also perform one more purpose: if a work has not just one but several rightholders, the collecting societies represent as trustees the rightholder who cannot be identified. Television productions, for example, not infrequently involve contacting 50 - 100 rightholders, and here it is very rare that every single one can be identified.

Digital libraries such as Europeana and other large-scale European digitisation projects are dependent on an EU-wide access. An integrated solution that links up the different territories of the Member States is therefore imperative.

The search for orphan works as well as their digitisation and publication must be based on state-of-the art science and technology. That is why it is necessary for the Directive to make it possible to apply the latest methods in the future. Therefore an intensive exchange of best practice views is essential within the Member States

AMENDMENTS

The Committee on Culture and Education calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1 **Proposal for a directive** **Recital -1 (new)**

Text proposed by the Commission

Amendment

(-1) The Union is required to take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

Or. en

Amendment 2 **Proposal for a directive** **Recital -1 a (new)**

Text proposed by the Commission

Amendment

(-1a) Cross-border online access to

orphan works contained in the collections of libraries, educational establishments, archives and museums as well as works contained in archives from public service broadcasting organisations throughout the Union contributes to the promotion and protection of the Union's cultural and linguistic diversity.

Or. en

Amendment 3
Proposal for a directive
Recital 1

Text proposed by the Commission

(1) Libraries, museums, archives, *educational* establishments, film heritage institutions and public service broadcasting organisations are engaged in large-scale digitisation of their collections or *archives* in order to create European Digital Libraries. ***Libraries, museums, archives, educational establishments, film heritage institutions and public service broadcasting organisations in the Member States*** contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. Technologies for mass scale digitisation of print materials and for search and indexing enhance the research value of the libraries' collections.

Amendment

(1) Libraries, museums, archives, *educational* establishments, film heritage institutions and public service broadcasting organisations ***in the Member States*** are engaged in large-scale digitisation of their collections or *archives* in order to create European Digital Libraries. ***They*** contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. Technologies for mass scale digitisation of print materials and for search and indexing enhance the research value of the libraries' collections.

Or. en

Amendment 4
Proposal for a directive
Recital 4

Text proposed by the Commission

(4) The exclusive rights for authors of reproduction and of **making available** to the public **of their works**, as harmonised under Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, require the consent of the author prior to the digitisation and making available of a work.

Amendment

(4) The exclusive rights for authors of reproduction and of **communicating their works** to the public, as harmonised under Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, require the consent of the author prior to the digitisation and making available of a work.

Or. en

Amendment 5
Proposal for a directive
Recital 5

Text proposed by the Commission

(5) In the case of orphan works, such prior consent to carry out acts of reproduction or of **making available** to the public cannot be obtained.

Amendment

(5) In the case of orphan works, such prior consent to carry out acts of reproduction or of **communicating** to the public cannot be obtained.

Or. en

Amendment 6
Proposal for a directive
Recital 7

Text proposed by the Commission

(7) In particular, a common approach to determine the orphan status and the permitted uses of orphan works is necessary to ensure legal certainty in the internal market with respect to the use of orphan works by libraries, museums, educational establishments, archives, film heritage institutions and **public service** broadcasting organisations.

Amendment

(7) In particular, a common approach to determine the orphan status and the permitted uses of orphan works is necessary to ensure legal certainty in the internal market with respect to the use of orphan works by libraries, museums, educational establishments, archives, film heritage institutions and broadcasting organisations.

Amendment 7
Proposal for a directive
Recital 8

Text proposed by the Commission

Amendment

(8) Cinematographic, audio and audiovisual works in the archives of public service broadcasting organisations and produced by them include orphan works. Taking into account the special position of broadcasters as producers of audio and audiovisual material and the need to adopt measures to limit the phenomena of orphan works in the future, it is appropriate to set a cut off date relating to the application of this Directive as far as the works in the archives of broadcasting organisations are concerned.

deleted

Or. en

Amendment 8
Proposal for a directive
Recital 8 a (new)

Text proposed by the Commission

Amendment

(8a) It is essential to prevent the creation of new orphan works in the future, taking into account the ever-increasing production and dissemination of creative content online in the digital era. A clear indication on how to identify and locate the rightholders is required as well as specific registration as a precondition for the full exercise of rights. It is also necessary to create a solid framework for the acquisition of rights. The legal framework should be open to technical developments and sufficiently flexible to

allow for future contracts between rightholders.

Or. en

Amendment 9
Proposal for a directive
Recital 9

Text proposed by the Commission

(9) For the purposes of this Directive, cinematographic, audio and audiovisual works in the archives of public service broadcasting organisations should be understood as including works commissioned by such organisations for their exclusive exploitation.

Amendment

(9) For the purposes of this Directive, cinematographic ***works and works forming a part of*** audio and audiovisual works in the archives of public service broadcasting organisations should be understood as including works commissioned by such organisations for their exclusive exploitation.

Or. en

Amendment 10
Proposal for a directive
Recital 11

Text proposed by the Commission

(11) For reasons of international comity, this Directive should only apply to works that are first published or broadcast in a Member State.

Amendment

deleted

Or. en

Amendment 11
Proposal for a directive
Recital 12

Text proposed by the Commission

(12) Before a work can be considered an

Amendment

(12) Before a work can be considered an

orphan work, a *good faith and reasonable* diligent search for *the author* should be carried out. Member States should be permitted to provide that such a diligent search may be carried out by the organisations referred to in this Directive or by other organisations.

orphan work, a diligent search for *its rightholder(s)* should be carried out. Member States should be permitted to provide that such a diligent search may be carried out by the organisations referred to in this Directive or by other organisations, *in particular duly entitled collecting societies*.

Or. en

Amendment 12
Proposal for a directive
Recital 13

Text proposed by the Commission

(13) It is appropriate to provide for a harmonised approach concerning such diligent search in order to ensure a high level of protection of copyright in the Union. A diligent search should involve the consultation of publicly accessible databases that supply information on the copyright status of a work. Moreover, in order to avoid duplication of costly digitisation, Member States should ensure that use of orphan works by the organisations referred to in this Directive is recorded in a publicly accessible database. To the extent possible, publicly accessible databases of search results and use of orphan works should be designed and implemented so as to permit interlinkage with each other on a pan-European level and consultation thereof through a single entry point.

Amendment

(13) It is appropriate to provide for a harmonised approach concerning such diligent search in order to ensure a high level of protection of copyright in the Union. A diligent search should involve the consultation of publicly accessible databases that supply information on the copyright status of a work. Moreover, in order to avoid duplication of costly digitisation, Member States should ensure that use of orphan works by the organisations referred to in this Directive, *in particular duly entitled collecting societies*, is recorded in a publicly accessible database. To the extent possible, publicly accessible databases of search results and use of orphan works should be designed and implemented so as to permit interlinkage with each other on a pan-European level and consultation thereof through a single entry point.

Or. en

Amendment 13
Proposal for a directive
Recital 14

Text proposed by the Commission

(14) Orphan works may have several **authors** or include other works or protected subject matter. This Directive should not affect the rights of known or identified rightholders.

Amendment

(14) Orphan works may have several **rightholders** or include other works or protected subject matter. This Directive should not affect the rights of known or identified rightholders.

Or. en

Amendment 14
Proposal for a directive
Recital 16

Text proposed by the Commission

(16) It is appropriate to provide that authors are entitled to put an end to the orphan status in case they come forward to claim their works.

Amendment

deleted

Or. en

Amendment 15
Proposal for a directive
Recital 20

Text proposed by the Commission

(20) This Directive should be without prejudice to **existing** arrangements in the Member States concerning the management of rights such as extended collective licences.

Amendment

(20) This Directive should be without prejudice to arrangements in the Member States concerning the management of rights such as extended collective licences.

Or. en

Amendment 16
Proposal for a directive
Recital 22

Text proposed by the Commission

(22) When a Member State authorises, under the conditions established in this Directive, the use of orphan works by publicly accessible libraries, educational establishments, museums, archives, film heritage institutions or public service broadcasting organisations for purposes beyond their public interest mission, rightholders who come forward to claim their works should be remunerated. Such remuneration should take account of the type of work and the use concerned. Member States may provide that revenues collected from such use of orphan works for the purpose of remuneration but which are unclaimed after the expiry of the period fixed in accordance with this Directive should ***contribute to financing rights information sources that will facilitate diligent search, by low-cost and automated means, in respect of categories of works that fall actually or potentially within the scope of application of this Directive.***

Amendment

(22) When a Member State authorises, under the conditions established in this Directive, the use of orphan works by publicly accessible libraries, educational establishments, museums, archives, film heritage institutions or public service broadcasting organisations for purposes beyond their public interest mission, rightholders who come forward to claim their works should be remunerated. Such remuneration should take account of the type of work and the use concerned. Member States may provide that revenues collected from such use of orphan works for the purpose of remuneration but which are unclaimed after the expiry of the period fixed in accordance with this Directive should ***be used to finance those cultural institutions or facilities most in need of support or those which would potentially produce the greatest cultural benefit.***

Or. en

Amendment 17
Proposal for a directive
Article 1 – paragraph 2 – introductory wording

Text proposed by the Commission

2. This Directive applies to works ***first published or broadcast in a Member State and*** which are:

Amendment

2. This Directive applies to works which are:

Or. en

Amendment 18
Proposal for a directive
Article 1 – paragraph 2 – point 3

Text proposed by the Commission

(3) Cinematographic, audio or audiovisual works produced by **public service** broadcasting organisations **before the 31 December 2002** and contained in their archives.

Amendment

(3) Cinematographic **works or works forming a part of** audio or audiovisual works produced by broadcasting organisations and contained in their archives.

Or. en

Amendment 19
Proposal for a directive
Article 2 – paragraph 1

Text proposed by the Commission

1. A work shall be considered an orphan work if the rightholder **in** the work is not identified or, even if identified, **is not** located after a diligent search for the rightholder has been carried out and recorded in accordance with Article 3.

Amendment

1. A work shall be considered an orphan work if the rightholder **of** the work is not identified or, even if identified, **cannot be** located after a diligent search for the rightholder has been carried out and recorded in accordance with Article 3.

Or. en

Amendment 20
Proposal for a directive
Article 2 – paragraph 2

Text proposed by the Commission

2. Where a work has more than one rightholder, and one of the rightholders has been identified and located, that work shall **not** be considered an orphan work.

Amendment

2. Where a work has more than one rightholder, **or if it includes other works or protected subject-matter**, and **if at least** one of the rightholders has **not** been **both** identified and located, that work shall **still** be considered an orphan work **for the purposes of this Directive. The rights of known or identified rightholders shall not be affected. Member States shall ensure**

that the organisations referred to in Article 1(1) or, more particularly, duly entitled collecting societies, pursue a diligent search to identify and locate the other rightholders of the work.

Or. en

Amendment 21
Proposal for a directive
Article 3 – paragraph 1

Text proposed by the Commission

1. For the purposes of establishing whether a work is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out for each work, by consulting the appropriate sources for the category of works in question.

Amendment

1. For the purposes of establishing whether a work is an orphan work, the organisations referred to in Article 1(1) ***or duly entitled collecting societies*** shall ensure that a diligent search is carried out for each work, by consulting the appropriate sources for the category of works in question.

Or. en

Amendment 22
Proposal for a directive
Article 3 – paragraph 3

Text proposed by the Commission

3. A diligent search is required to be carried out only in the Member State of first publication or broadcast.

Amendment

3. A diligent search is required to be carried out only in the Member State of first publication or broadcast ***prior to the use of the work.***

Or. en

Amendment 23
Proposal for a directive
Article 3 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. Duly entitled collecting societies shall operate on behalf of those rightholders who even after a diligent search cannot be located.

Or. en

Amendment 24
Proposal for a directive
Article 5 – paragraph 1

Text proposed by the Commission

Amendment

Member States shall ensure that *a* rightholder ***in a work considered to be orphan*** has, at any time, the possibility of putting an end to the orphan status.

1. Where a work considered to be orphan has only one rightholder, Member States shall ensure that ***that*** rightholder has, at any time, the possibility of putting an end to the orphan status.

Or. en

Amendment 25
Proposal for a directive
Article 5 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Where an orphan work has more than one rightholder, or if it includes other works or protected subject-matter, it shall only be possible to put an end to its orphan status if all rightholders have been identified and located in accordance with Article 2(2).

Or. en

Amendment 26
Proposal for a directive
Article 5 a (new)

Text proposed by the Commission

Amendment

Article 5a

Remuneration of rightholders

Rightholders who put an end to the orphan status of a work in accordance with Article 5(1a) shall be remunerated for the use that has been made of the work by the organisations referred to in Article 1(1). Rightholders may claim their remuneration within a period fixed by Member States, which shall not be less than five years from the date of the act giving rise to the claim. If a collecting society as referred to in Article 3 was entitled to collect the remuneration for the rightholders as a trustee, the claim for remuneration shall be made against the collecting society.

Or. en

Amendment 27
Proposal for a directive
Article 6 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) by ***making*** the orphan work ***available***, within the meaning of Article 3 of Directive 2001/29/EC;

(a) by ***communicating*** the orphan work ***to the public*** within the meaning of Article 3 of Directive 2001/29/EC;

Or. en

Amendment 28
Proposal for a directive
Article 6 – paragraph 2

Text proposed by the Commission

2. However, ***unless otherwise provided in Article 7***, the organisations referred to in Article 1(1) ***may*** not use orphan works in order to achieve aims other than their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works contained in their collections.

Amendment

2. However, the organisations referred to in Article 1(1) ***shall*** not use orphan works in order to achieve aims other than their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works contained in their collections.

Or. en

Amendment 29

Proposal for a directive Article 6 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. In the case of an orphan work where one or more rightholders have been identified but not located, the name(s) of the rightholder(s) in question shall be indicated in any use of the work.

Or. en

Amendment 30

Proposal for a directive Article 7 – title

Text proposed by the Commission

Amendment

Article 7

deleted

Authorised uses of orphan works

Or. en

(See all the other amendments on Article 7)

Amendment 31
Proposal for a directive
Article 7 – paragraph 1 – introductory wording

Text proposed by the Commission

Amendment

1. Member States may authorise the organisations referred to in Article 1(1) to use an orphan work for purposes other than those referred to in Article 6(2), provided that: *deleted*

Or. en

Amendment 32
Proposal for a directive
Article 7 – paragraph 1 – point 1

Text proposed by the Commission

Amendment

(1) the organisations referred to in Article 1(1) maintain records of their diligent search; *deleted*

Or. en

Amendment 33
Proposal for a directive
Article 7 – paragraph 1 – point 2

Text proposed by the Commission

Amendment

(2) the organisations maintain publicly accessible records of their use of orphan works; *deleted*

Or. en

Amendment 34
Proposal for a directive
Article 7 – paragraph 1 – point 3

Text proposed by the Commission

Amendment

(3) in the case of an orphan work where a rightholder has been identified but not located, the name of the rightholder is indicated in any use of the work; *deleted*

Or. en

Amendment 35
Proposal for a directive
Article 7 – paragraph 1 – point 4

Text proposed by the Commission

Amendment

(4) rightholders which put an end to the orphan status of the work, within the meaning of Article 5, are remunerated for the use that has been made of the work by the organisations referred to in Article 1(1); *deleted*

Or. en

Amendment 36
Proposal for a directive
Article 7 – paragraph 1 – point 5

Text proposed by the Commission

Amendment

(5) rightholders may claim their remuneration under point (4) within a period fixed by Member States and which shall not be less than five years from the date of the act giving rise to the claim. *deleted*

Or. en

Amendment 37
Proposal for a directive
Article 7 – paragraph 2

Text proposed by the Commission

Amendment

2. Member States may chose the means for authorising use within the meaning of paragraph 1 and remain free to decide on the use of any revenues which are unclaimed after the expiry of the period fixed in accordance with paragraph 1(5).

deleted

Or. en