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Committee on the Internal Market and Consumer Protection

2011/0136(COD)

30.9.2011

DRAFT OPINION

of the Committee on the Internal Market and Consumer Protection

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 – C7-0138/11 – 2011/0136(COD))

Rapporteur: Toine Manders

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SHORT JUSTIFICATION

We live in a digital era. Some people already say that what you can not find on Internet does not exist at all. In view of the enormous advantages that the rational dissemination of information on-line can bring to the Internal Market, the digitisation of cultural material has been and should be further supported on a European scale.

Orphan works are works whose rightholder or rightholders cannot be identified or found, while making a work available to the public requires - in accordance with copyright principles - an authorisation from the rightholder. Directive 2001/29/EC¹ provided for certain exceptions that allow scanning for preservation purposes but they do not allow libraries to make the digitised works available online on the Internet, even for non-commercial purposes.²

The present legislative initiative builds on the Commission's 2006 Recommendation on the digitisation and online accessibility of cultural content and digital preservation.³ Despite the Recommendation, only a few Member States introduced legislation on orphan works and the existing solutions are anyway circumscribed by the fact that they limit online access to citizens resident in their national territories and do not provide for the recognition of diligent searches already carried out in other Member States.

The European Parliament has already expressed its support for a legislative solution to be found to the problematic issues of orphan works and for the creation of a European database to facilitate availability of information⁴. In its resolution of 6 April 2011 on a Single Market for Enterprises and Growth⁵, the Parliament also stressed that the creation of an improved system for the management of copyright is indispensable for supporting innovation and creativity within the Single Market.

The present proposal of the Commission aims to allow libraries, educational establishments, museums and archives to provide specific services in the Internal Market which involves the display of orphan works online. One of operational objectives of the proposal is to diminish transaction costs for the online use of orphan works by these institutions, and also to facilitate cross-border access.

The Commission presented six options in the impact assessment accompanying the legislative proposal, including a do-nothing option and modalities of statutory exemption or licencing that would facilitate digitisation of orphan works. Taking into account the results of broad consultations with various stakeholders, the proposal eventually favours mutual recognition of national solutions enabling the libraries to provide for online access to orphan works. It is worth noting that information about all orphan works identified as such in the relevant

¹ Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10-19).

² Under Article 5(3)(n) of the 2001 Directive, libraries can only provide access to works contained in their collections on dedicated terminals on their premises for the purpose of research or private study.

³ OJ L 236, 31.8.2006, p. 28-30.

⁴ Resolution of 12 May 2011 on unlocking the potential of cultural and creative industries (P7_TA(2011)0240, point 71 and Resolution of 5 May 2010 on Europeana - the next steps (OJ C 81, 15.3.2011, p. 16-25).

⁵ 2010/2277(INI), point 56.

jurisdictions should be available universally and at no cost. In the event that a rightholder comes forward to make a substantiated claim of ownership in the country of first publication, the authorities in that Member State would revoke the 'orphan works' status and this decision, in turn, would be valid in all other Member States.

The Commission makes an important reference to the Google Books Settlement reached in 2008/2009 between Google and the Authors' Guild and the Association of American Publishers, which would allow Google to use most orphan works without any prior permission and display them online in the United States, this putting Europe far back in terms of competitiveness and access to human heritage. As the Court of the Southern District of New York opposed the agreement in March 2011 (*inter alia* on grounds of alleged monopoly over the use of orphan works that the Agreement would grant Google) and suggested legislative activity instead¹, the European Union should take the opportunity to provide an example of how this matter can be resolved in a satisfactory way for all future users and beneficiaries, including rightholders.

The Rapporteur welcomes the proposal of the Commission and agrees with its specific objective that an EU-wide online availability of orphan works will promote Europe's cultural diversity and increase sources of knowledge and learning.

Nevertheless the Rapporteur considers some amendments to the Commission proposal. In general, the Rapporteur wants to highlight that copyright is the foundation for innovation, creation, investments and productions in the creative industry. The problems around orphan works should get proper framing, so that measures will not be taken too broadly. In addition, for the preservation of cultural inheritance, the permitted use of orphan works should not be utilised to achieve direct or indirect economic or commercial advantage. Furthermore, the rapporteur believes that the criteria for the remunerations of rightholders should be harmonised, to create legal certainty and guarantees at EU-level. He finds it important that rightholders can put an end to the status of orphan work by a simple and uniform procedure in the Member State of their choice.

More specifically, the Rapporteur would like to emphasise the importance of compatibility and interoperability of the interlinked databases. The situation that a work gets an undeserved predicate of orphan work should be avoided.

According to the Rapporteur, questions that still need an answer are whether the beneficiaries mentioned in the proposal of the Commission should get harmonised definitions, and how Member States will deal with the situation that one Member State has to do the diligent search but the available information in another Member State is more accurate and up-to-date, so more fit for the actual search. Also the spectrum of permitted use needs further attention, since the proposal leaves the door open not only for broad interpretation of the definition but also for all kinds of forms of use by the various Member States.

¹ http://thepublicindex.org/docs/amended_settlement/opinion.pdf, page 23.

AMENDMENTS

The Committee on the Internal Market and Consumer Protection 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 4 a (new)

Text proposed by the Commission

Amendment

(4a) Copyright is the economic foundation for the creative industry.

Or. en

Amendment 2

Proposal for a directive Recital 12

Text proposed by the Commission

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.

(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 ***as long as those organisations carry out the diligent search in good faith and in a reasonable manner and use the results in order to attain objectives in the public interest, unless otherwise provided.***

Or. en

Amendment 3

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. ***In order to avoid duplication of search efforts, a diligent search should be conducted only in the Member State where the work was first published or broadcast.*** Moreover, in order to avoid duplication of costly digitisation ***and to ascertain whether the orphan status of a work has been established in another Member State,*** Member States should ensure that ***the results of diligent searches carried out in their territories and the*** use of orphan works by the organisations referred to in this Directive ***are*** recorded in a publicly accessible database. To the extent possible, publicly accessible databases of search results, ***available free of charge,*** and use of orphan works should be designed and implemented so as to permit interlinkage ***and interoperability*** with each other on a pan-European level and consultation thereof through a single entry point.

Or. en

Justification

Merging Recital 13 and Recital 15 for more coherence.

Amendment 4

Proposal for a directive Recital 13 a (new)

Text proposed by the Commission

Amendment

(13a) Online accessibility of cultural content and digital preservation often fail to fulfil their potential owing inter alia to inadequate resources in the Member States and interconnection of databases that are incompatible. For the purposes of this Directive, Member States should be asked to consider standardisation at European level for digitisation of works, in order to improve the central registration, accessibility and interoperability of their public databases.

Or. en

Amendment 5

Proposal for a directive Recital 15

Text proposed by the Commission

Amendment

(15) In order to avoid duplication of search efforts, a diligent search should be conducted only in the Member State where the work was first published or broadcast. In order to enable other Member States to ascertain whether the orphan status of a work has been established in another Member State, Member States should ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database.

deleted

Or. en

Justification

Merging Recital 13 and Recital 15 for more coherence.

Amendment 6

**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 existing ***and future*** arrangements in the Member States concerning the management of rights such as extended collective licences.

Or. en

Amendment 7

**Proposal for a directive
Recital 21**

Text proposed by the Commission

(21) Member States should also be allowed to permit the use of orphan works for purposes which go beyond the public interest missions of the organisations covered by this Directive. In such circumstances, the rights and legitimate interests of rightholders should be protected.

Amendment

(21) Member States should also be allowed to permit the use of orphan works for purposes which go beyond the public interest missions of the organisations covered by this Directive. In such circumstances, the rights and legitimate interests of rightholders should be protected, ***in accordance with the international and EU law, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Berne Convention for the Protection of Literary and Artistic Works of 1886 and Directive 2001/29/EC.***

Or. en

Amendment 8

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 first published, broadcast **or communicated to the public** in a Member State and which are:

Or. en

Amendment 9

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 in the work is not identified or, even if identified, is not located after a **reasonably** diligent search for the rightholder has been carried out **in good faith** and recorded in accordance with Article 3.

Or. en

Amendment 10

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, broadcast **or other form of communication to the public. Where the first publication, broadcast or other form of communication to the public took place simultaneously in two or more**

Member States, the diligent search shall be carried out in all those Member States.

Or. en

Amendment 11

Proposal for a directive Article 3 – paragraph 4

Text proposed by the Commission

4. Member States shall ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database.

Amendment

4. Member States shall ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database *which is available free of charge.*

Or. en

Amendment 12

Proposal for a directive Article 5

Text proposed by the Commission

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.

Amendment

Member States shall ensure that a rightholder in a work considered to be orphan has, at any time, the *real* possibility of putting an end to the orphan status *in a speedy, uniform and cost-effective manner, in the Member State of his choice.*

Or. en

Amendment 13

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, unless otherwise provided in Article 7, the organisations referred to in Article 1(1) may not use orphan works in order ***to achieve any direct or indirect economic or commercial advantage or*** 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 14

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

Text proposed by the Commission

(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);

Amendment

(4) rightholders which put an end to the orphan status of the work, within the meaning of Article 5, are ***adequately and properly*** remunerated for the use that has been made of the work by the organisations referred to in Article 1(1) ***and the remuneration becomes payable from the day on which the act giving rise to entitlement thereto first occurs;***

Or. en

Amendment 15

Proposal for a directive

Article 7 – paragraph 1 – point 5 a (new)

Text proposed by the Commission

Amendment

(5a) ultimate liability for payment of the remuneration lies with the Member State in which the diligent search was conducted.

Or. en