

Making orphans available:

an overview of the proposed EC directive on certain permitted uses of orphan works and its practical implications

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Orphan works

- Works which copyright owner cannot be identified or found



Implications

- Prior consent is necessary for memory institutions before:
 - Digitisation / reproduction
 - Making available of works
- If copyright owner cannot be identified or located no authorisation can be obtained
- Major obstacle in digitisation process

Background (1)

- 2006 – EC Recommendation on the digitisation and online accessibility of cultural content and digital preservation
- 2006 – High Level Expert Group on Digital Libraries – “Final Report on Digital Preservation, Orphan Works and Out-of-Print Works”
- 2008 – EC Green Paper on Copyright in the Knowledge Society
- 2009 – EC follow-up Communication on Copyright in Knowledge Society
- 2009-2010 - impact assessment, public hearings, consultations, discussions with stakeholders
- May 2011 – Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works
- Key action of the Digital Agenda for Europe, core component of Europe 2020 Strategy

Background (2)

- Only handful of EU Member States have implemented EC Recommendation of 2006
- Different approaches in the Member States present obstacles to cross-border access and functioning of internal market

Objective

- To create a **legal framework** to ensure the **lawful, cross-border online access** to orphan works contained in online digital **libraries and archives** operated by a variety of institutions when orphan works are used in the pursuance of the **public interest** mission.

Scope

- Works published in the form of books, journals, newspapers, magazines and other writings
- Cinematographic or audiovisual works
- Cinematographic, audio or audiovisual works produced by public service broadcasting organisations before the 31 of December 2002
- Contained in the collections of publicly accessible libraries, educational establishments, museums, archives, film heritage institutions, public service broadcasting organizations

Orphan status

- Rights holder of the work cannot be identified or located after a diligent search
- Where a work has more than one right holder, and one of the rights holders has been identified and located, that work shall not be considered an orphan work
- Rights holders can put an end to the orphan status of the work at any time

Diligent search (1)

- Carried out according to the rules adopted by each Member State
- Carried out only once, in the Member State of first publication or broadcast
- Results of diligent searches recorded in a publicly accessible database
- A work consider an orphan work after a diligent search performed in one Member State to be considered an orphan work in all Member States

Diligent search (2)

- For published books:
 - Legal deposit
 - Existing databases and registries (ARROW, ISBN)
 - Databases of collecting societies
- For audiovisual works
 - Legal deposit
 - Databases of film heritage institutions and national libraries
 - Databases with relevant standards and identifiers such as ISAN
 - Databases of relevant collecting societies

Permitted uses (1)

- To make work available
- To reproduce for the purposes of digitization, making available, preservation etc.
- Only to achieve public interest missions
 - Preservation
 - Restoration
 - Provision of cultural and educational access

Permitted uses (2)

- Member States may authorise to use works for other purposes, provided that:
 - Records of diligent search are maintained
 - Records of use of works are publicly accessible
 - Names of rights holders are indicated in cases where the rights holder is identified but cannot be located
 - Rights holders which put an end to the orphan status of the work are remunerated for the use of the work
 - Rights holders can claim the remuneration within a period no less than five years from the claim

Criticism

- Exclusion of unpublished works, artistic works, sound recordings
- Not facilitating of mass digitisation
- Unclear provisions on public interest mission and permitted uses
- Unclear provisions on data bases
- Unclear provisions fair compensation
- Compability with extended collective licencing schemes
- Scope of institutions

Practical implications (1)

- Directive to be adopted by Member States by...
- At least one year after the entry into force of the Directive EC has to report on the possible inclusion in the scope of the Directive of other types of work – phonograms, standalone photographs and other images

Practical implications (1)

- Legal certainty
- Lots and lots of hard manual labour... At least for NLL
- Almost no orphan works in Latvian audiovisual archives
- Out-of-Print works – still an uncharted territory, although there is some progress – see Memorandum of Understanding