

The European Proposal for a Directive on Orphan Works: a partial attempt to speed-up digitisation of European cultural heritage

On 24th of May 2011, the European Commission published its long awaited Proposal for a Directive on Orphan Works. This timely proposal is meant to find a Europe-wide solution to the issue of orphan works. Nevertheless, rather than providing a true solution to the question, its provisions reflect that more debate on how to reconcile authors' rights and consumers' rights to access in an online environment is needed before engaging in legislative steps.

The orphan works problem: slowing down digitisation of Europe's cultural heritage

Stakeholders involved in digitisation initiatives have claimed for some time already the need to find solutions which enable the use of orphan works in the online environment. Indeed, in the advent of new technologies many institutions of public interest (libraries, archives, museums, or educational establishments) and businesses have engaged in the digitisation of creative content and have encountered problems in relation to works for which right holders cannot be identified or located, so-called orphan works. The European Digital Library, Europeana, various national initiatives such as Images for the Future in the Netherlands or public-private partnerships such as the British Library and Microsoft digitisation project or the Google Books Settlement in the US are examples of digitisation processes that have revealed the orphan works issue.

The search for a right holder can be time consuming and extremely costly, and, if a right holder cannot be identified or located no permission for the use of a work can be obtained. In practice this means that the work cannot be digitised and made accessible online to the public. Thereby many valuable archive materials and creative works remain sitting on the shelves of public and private archives' collections without the possibility of being exposed to a broad public. Authors and rights holders also cannot benefit from new means of exploitation and thus revenue. The difficulty of clearing rights for orphan works can also be an impediment for the development of new business models online, which need important amounts of digitised creative content in order to be successful.

The orphan works issue concerns mostly works created in the first part of the 20th century, which are still protected under copyright law. While research on the scope of the

orphan works problem is still scarce, available data give an approximate idea on the magnitude of the problem: 40% of all in-copyright works contained in the British Library collections¹ and around 21% of the total number of films in 24 film archives² across Europe are orphan works.

Given the implications in terms of safeguarding European cultural heritage and cultural diversity online, as well as the development of sustainable business models for online content platforms, it is crucial to find solutions that allow the easy use and rights management for the reproduction and making available of orphaned materials. Many Member States have waited for EU guidelines, and in particular for an EU-Directive to introduce new mechanisms (Germany, Greece, Romania, Slovakia) or to adapt existing mechanisms (Czech Republic, France, Sweden) dealing with orphan works. Today only Denmark and Hungary offer complete legislative solutions to the problem.

In 2007 the European Commission started the so-called i2010 Digital Libraries Initiative in order to investigate and establish a Europe wide solution to facilitate rights clearance of orphan works. However, the result in form of a proposal for a Directive on Orphan Works only addresses the problem partially and will no doubt give rise to extensive debates.

The European Proposal for a Directive: victim of an unsolved debate?

The Proposal for a Directive on Orphan Works has now been published (May 2011) and establishes rules to categorise works as orphan and allows their lawful reproduction and making available across the EU. However, its scope is rather limited. It applies to printed, cinematographic, audio and audiovisual works (excluding phonograms or stand-alone photographs) contained only in libraries, archives, museums, educational establishments, film heritage institutions and public service broadcasting organisations. It is also restricted to the exploitation of these works by such institutions in the context of their public interest missions, which are however not clearly defined in the proposal. The proposed Directive therefore only establishes rules for non-commercial exploitation of orphan works, and leaves it to Member States to find solutions for orphan works commercially exploited, provided a list of additional conditions is fulfilled (the indication in any

1. British Library, Orphan Works and Mass Digitisation, 29 September 2010 <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=635>
2. ACE, results of the Survey on Orphan Works. 2009/10, Frankfurt/Brussels 29 March 2010



use of the work of the name of the rights holder identified but not located, and his/her right to claim remuneration within a period of time fixed by Member States).

However, with growing online markets for creative content, the commercial exploitation of orphan works can become a reality in the near future and might also require an European solution, be it only several general rules as regards, for instance, due diligence search for the rights holders, rights of exploitation for orphaned works and rules in relation to situations where the rights holders reappear.

Yet, the limited scope of the proposed Directive and the fact that a lot of margin is left to Member States might cause more confusion than efforts to harmonise solutions in relation to orphan works. The proposal reflects an unsolved wider debate, underlying all European policies in relation to creative content online, concerning the balance between protecting authors' rights and guaranteeing consumers' access to content in the online environment. It seems indeed, that the proposed Directive is based on a compromise between DG Internal Market (Commissioner Michel Barnier) on the one hand, and DG Information Society (Commissioner Neelie Kroes) on the other. DG Internal market are taking the position that authors' rights need to be protected, and pushing for a legally restrictive instrument for the rights clearance of orphan works limited to the print sector whereas DG Information

Society are adopting the view that consumer access to content needs to be guaranteed before establishing too protective authors' rights systems favouring, therefore, a rather loose regulation, leaving more margin for Member States and facilitating also access of audiovisual orphan works. The difficulty to reconcile these two visions has led to a political compromise which offers neither an entirely satisfying Europe-wide solution for a problem that should be solved at European level, nor enough guidance for Member States in relation to national solutions for the orphan works issue. Still, this debate will have to be addressed and a balanced solution will have to be found for any efficient and sustainable solution in relation to orphan works to be implemented. In general, effective European legislation to facilitating rights management and rights clearance for the online exploitation of creative content largely depends on a common vision of the balance between authors' rights and consumers' rights.

It is now up to the European Parliament and the Council to continue the debate between valuing authors' rights and consumers' access and to find a true European way to address the issues at stake.

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