

**ISF position statement in the light of current development of the Orphan Works directive (23 March 2012)**

Information Sans Frontières represents the cultural institutions of Europe — archives, galleries, and libraries and museums of all kinds.

We are deeply disappointed in the outcome of the vote in the Legal Affairs Committee of the European Parliament on 1 March. Support for 'commercial use' was suddenly withdrawn, and the other amendments agreed in Committee are haphazard. After the vote, the Parliament's text leaves the question of orphan works essentially unsettled. It will do little to facilitate the digitisation of large numbers of orphans, particularly in view of its inclusion in scope of all embedded works: the large-scale digitisation mentioned in its first recital will remain an unachievable ambition.

The text contains important internal contradictions and inconsistencies. **We hope that the following difficulties will be removed in forthcoming negotiations with the Commission and Council. If they are allowed to remain, the Directive will not achieve its purpose, according to the Commission's IP strategy ([http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf)) of promoting the digitisation and making available of the collections of European cultural institutions (p.13). We believe that the Directive will set damaging precedents, and will be of negligible use to our member institutions. As the intended beneficiaries of the Directive, we shall ask the Parliament to reject the Directive in plenary if these problems are not solved.**

Information Sans Frontières would be happy to assist in discussions towards making orphan works available efficiently and effectively to European citizens through their cultural institutions.

*1. The 'liability' amendment*

The new Recital 16a introduced by the Legal Affairs Committee negates, in a few words, the purpose of the Directive, which is to provide legal certainty, and to minimise risk, for public institutions when they make limited use of the orphan works in their care, for the benefit of Europe's citizens and scholars.

By virtue of pre-existing legislation, cultural institutions are liable when they commit copyright infringements: so naturally they will also be liable if they conduct their searches in a negligent manner. When, as in Recital 16a, a Directive states the obvious, it creates extra weight, leading to the interpretation that institutions will be to a greater degree liable regarding diligent searches, than is normally the case with other infringements. Evaluating the diligence of a search is inherently difficult. Thus the effect of the new Recital is likely to be that institutions will abstain from using the Directive.

**We ask for the removal of this Recital. It is superfluous and, because of that, harmful and counter-productive to the overall aim: the digitisation of Europe's cultural heritage.**

*2. Remuneration for past use*

The Legal Affairs Committee's amendments 13 and 44 introduce a requirement for remuneration, if a rightholder appears to assert his or her rights. The important point here is that the remuneration is to be paid for use dating from before the rightholder's appearance. We agree with the principle that a rightholders should be entitled to payment for the future use of their work (or to prevent such use), after they have appeared to make their claim. But payment for past use opens great uncertainty, contrary to the purpose of the Directive.

**We ask for all requirements for remuneration for use prior to a rightholder's appearance, to be removed from the Directive, in order to restore the Directive's original purpose of removing uncertainty and legal risk from the use of orphan works by appropriate institutions.**

*3. No 'commercial use'*

All provisions for 'commercial use' were removed by the Legal Affairs Committee. This leaves a text full of inconsistencies. On the one hand, Recital 18 protects agreements with commercial partners; and Article 6(3) safeguards freedom of contract in general, and public-private partnership agreements in particular. On the other hand, with the deletion of Article 7, no permitted commercial uses survive. This situation is hardly logical.

It is widely recognised that digitisation is expensive, and that cultural institutions are rarely well-funded. By this move, the Legal Affairs Committee has removed, at a stroke, the possibility of funding from private sources, which would have provided benefits in both the public and private spheres.

**We ask for the restoration of Article 7 in order to re-open the possibility of part-private funding.**

*4. An attempt to amend the InfoSoc Directive retrospectively*

In its definition of permitted uses, Article 6 (1) of the Orphan Works Directive refers to the InfoSoc Directive (2001/29/EC). Without any justification it qualifies the provisions of the earlier Directive, restricting what cultural institutions may do with reproductions of orphan works. These restrictions are unnecessary, because Article 6 (2) of the Orphan Works Directive has very similar effect. As a matter of very important principle, they are objectionable because they call into question the effect of the Directive of 2001.

We are glad to see that a recent text by the Council (22 February) includes wording, in its Recital 17, to safeguard the exceptions in the InfoSoc Directive.

**We call for an addition to Article 8 of the Orphan Works Directive to make clear that its effects are without prejudice to the exceptions provided by Directive 2001/29/EC.**

*5. Over-elaborate technical requirements for record-keeping*

We are pleased that the requirements for record-keeping are relatively simple in the text approved by the Legal Affairs Committee at Article 6 (4a), in terms of publicly accessible records. But Article 3 (4) requires databases 'designed and implemented so as to permit inter-linkage with each other on a pan-European level'. It is inappropriate for legislation to be technically specific, because technology changes too fast. In this case the requirement is a technical fantasy, ignoring the difficulties of producing compatible databases of artefacts in museums, texts in libraries, and films and phonograms in film and sound archives. When an unrealistic technical scenario is elevated to a legal requirement, it becomes an obstacle to progress. **We agree with a duty to provide publicly-accessible records, but we ask for the removal of further technical specification from the Directive's precise requirements.**

*6. Mutual recognition of national licensing of orphan works*

In our opinion it is a missed opportunity that the Directive respects the licensing of orphan works under national legislation, but shrinks from providing that an orphan work legitimately licensed in one Member State shall be considered an orphan work in all Member States. **In the interests of efficiency and in the context of the Single Market, we call for the mutual recognition of licensed orphan works to be included in the Directive.**

**Contacts**

Toby Bainton  
Senior Policy Adviser  
[toby.bainton@btinternet.com](mailto:toby.bainton@btinternet.com)  
Tel: +44-7961-323-597  
[www.informationsansfrontieres.eu](http://www.informationsansfrontieres.eu)

Helena Lovegrove  
Public Affairs Director  
[helena.eva.lovegrove@gmail.com](mailto:helena.eva.lovegrove@gmail.com)  
Tel: +32-486-948-212  
[www.informationsansfrontieres.eu](http://www.informationsansfrontieres.eu)