

Reaction of the COMMUNIA association to the proposed directive on certain permitted uses of orphan works (COM/2011/0289).

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Among the 14 COMMUNIA policy recommendations¹ that were published at the conclusion of the EU funded COMMUNIA thematic network on the public domain, is one that directly addresses the issue of access to orphan works in Europe:

Recommendation #9: Europe needs an efficient pan-European system that guarantees users full access to orphan works. Both mandatory exceptions and extended collective licensing in combination with a guarantee fund should be explored. Any due diligent search requirements should be proportionate to the ability of the users to trace the rights holders.

Given this long running concern COMMUNIA is pleased to see that the European Commission has decided to address this issue by presenting a directive on certain permitted uses of orphan works (COM/2011/0289).

The issue of orphan works shows that the current copyright system based on the default presumption of proprietary and exclusive rights is no longer workable as such. Orphan works should be seen as only one example of the broad issue of rights' use authorisations that have arisen in the information society. Whilst the development of mass digitisation projects is only beginning, further rights clearance issues can be foreseen for the administration of the European cultural heritage.

We think that the explanatory statement of the proposed directive, or at least some recitals, should include such considerations. The issue of orphaned works is to be put into the broader context of the inadequacy of the existing European copyright system. Orphan works are far from being an isolated technical law issue. They are the "tip of the iceberg" of a large amount of cultural goods being underestimated and underused, to the detriment of the public domain, and of the public interest.

¹ <http://www.communia-association.org/recommendations> These policy recommendations are one of the outcomes of the COMMUNIA network on the public domain, a program that brought together more than 50 European organisations working on the Public Domain. You can find more information about this project at <http://www.communia-project.eu/>.

Access to orphan works

Communia applauds the Commission's efforts to make orphan works more accessible. However, in its current form, the proposed directive has significant shortcomings and excludes important groups of potential users and as such, falls short of providing an efficient mechanism to release the full potential that is locked within orphan works in Europe.

COM/2011/0289 must be analysed in the light of the policy recommendation quoted above. There are four main aspects of COMMUNIA Policy Recommendation #9 that form the basis of our reaction to the proposed directive: (1) Europe needs an efficient Pan European version of dealing with orphan works, (2) users should have full access to such works, (3) mandatory exceptions and extended collective licensing (ECL) should be explored and (4) due diligence requirements need to be proportional to the resources available to users.

The Commission has seen the need to address the first issue, but its proposal is seriously flawed because it only applies to certain types of works where it should apply to all types of protected works.

The second aspect is similarly crippled by its restriction to limited types of users (Libraries, museums, archives, educational establishments, film heritage institutions and public service broadcasting organisations). These are not the only sources of access to our shared culture and heritage. It is COMMUNIA's position that the group of users who may benefit from the orphan works directive should be widened potentially to include everyone. The targeted group of end users should include individual end users and non-profit initiatives like Wikipedia, which would currently not benefit from the proposed directive. Wikipedia is one of the most important platforms for access to cultural heritage information drawing more than 136.9 million European users alone.²

In this regard, the proposed directive falls short of recognizing the changes of how we access and deal with cultural heritage institutions. Europeans are increasingly accessing and using cultural heritage information without mediation by the formal institutions that the proposed directive targets. This development will likely continue in the future and any legislative proposal that does not take these changing realities into account will only worsen the situation by cementing the status quo-ante.

With regards to the third aspect, the Commission has wisely opted for one of the two approaches recommended by Europeana (Article 6 of the proposed directive should be read as a mandatory exception) but the proposal unfortunately shuts the door for additional ECL solutions (Recital 20 notes that the directive would be without prejudice to "existing" ECL arrangements). Extended Collective Licensing agreements offer many benefits over the approach chosen by the Commission. Especially in the context of mass digitisation projects, where the problem is not only one of orphan works but also of the sheer multitude of rights-

² Counts of Wikipedia's worldwide unique visitors range from 212 to 920 million. See http://meta.wikimedia.org/wiki/User:Stu/comScore_data_on_Wikimedia.

holders. ECLs offer solutions that are not available via the mechanisms outlined in the directive. The applicability of ECLs is still being explored (in among other contexts the Europeana Project funded by the Commission) and it is therefore too early to rule out ECLs as a solution.

In line with COMMUNIA policy recommendation #3³ and with regards to the fourth aspect of recommendation #9 the Commission is urged to ensure that the proposed exception for the use of orphan works is harmonized across the Member States and also provides for unified search criteria and requirements for databases that record the results of searches carried out by users.

The proposed directive

In summary, the public interest should govern the legal framework applicable to orphan works. COM/2011/0289 falls short of taking into account the changed realities of the way we now access our shared heritage and culture. For the first time in history, technology enables nearly universal access to our cultural & scientific heritage. This requires a legislative intervention that goes further than extending a limited amount of privileges to legacy institution into the digital realm.

The proposed directive on orphan works offers an unprecedented opportunity to further examine the evolution of public interest mission services within the information society. In this respect, the issue of orphan works reveals the importance of the role of public interest organisations in the preservation of the European cultural heritage. Such institutions should be considered more broadly (not only libraries, museums...) to encompass the growing involvement of non-profit and private institutions in the mass digitisation of cultural and scientific heritage.

Article 1 Subject matter and scope

Sub 1:

The scope of COM/2011/0289 should include non-profit initiatives and individual users. These should be granted the same rights as publicly accessible libraries, educational establishments, museums, as well as archives, film heritage institutions and public service broadcasting organisations. In addition other entities (commercial) should also receive the rights established in article 7.

³ Recommendation # 3: Harmonize Exceptions and Limitations of the Copyright Directive among the Member States and open up the exhaustive list so that the user prerogative can be adapted to the ongoing technological transformations.

Sub 2:

The proposed directive covers works published in the form of books, journals, newspapers, magazines, other writings, cinematographic and audio-visual works. It yet omits significant parts of cultural heritage collections (such as photographs). The Commission fails to provide a convincing explanation for this selective approach that will severely limit the usefulness of the directive, especially when it comes to making available heterogeneous collections. COM/2011/0289 should cover all types of protected works.

Although the orphan works problem is especially acute in respect of unpublished works, the proposed directive only covers published works. There is no convincing argumentation for limiting the scope of the directive to published works. The final instrument should include unpublished works.

COM/2011/0289 ties certain types of works to certain types of institutions. In line with the above comment with regards to art 1 sub 1, all types of uses should be covered by the rights established by the proposed directive, for all types of works.

Article 2 Orphan works

Sub 2:

This part of the proposed directive is drafted in such a way that it does not offer any benefits in the case of partially orphaned works. COM/2011/0289 states that works with more than one rights-holder of which at least one is known and located shall not be considered as orphan works. This means that all works with at least one unidentified or not located rights-holder will remain unusable. In line with the directive's objective to increase access to orphan works, this section should be modified, so that works with known and unknown rights-holders can be used in accordance with articles 6 & 7 as long as the known rights holders do not object to such uses. This approach would still comply with consideration 14 of the proposed directive.

Article 3 Diligent search

Sub 3:

In line with our above concern regarding unpublished works we want to reiterate that there need to be mechanisms to determine the location where a search has to be carried out in cases where the works have not been published or where it is unclear where the works in question have been first published.

Article 6 Permitted uses of orphan works

Sub 1:

It should be made clear that the forms of use described in article 6 are allowed without a remuneration obligation.

Sub 1(a):

The rights granted here should not be limited to the 'making available' right. There is no good reason to prevent orphan works from being used in print publications. Article 6 sub 1 (a) should be expanded to include the distribution right within the meaning of Article 4 of Directive 2001/29/EC.

Sub 1(b):

'[I]ndexing and cataloguing' are not among the uses covered by copyright and should not be listed here in order to avoid the impression that these activities would require the permission from rights-holders.

Sub 3:

The formulation of this section is highly ambiguous. It should be made clear that the rights granted in article 6 of the proposed directive cannot be given up by contract or other means. In line with COMMUNIA policy recommendation #7⁴ article 6 should be seen as a mandatory exception that cannot be limited by contract or otherwise.

Article 7 Permitted uses of orphan works

The fact that article 7 allows beneficiaries of the directive to act for purposes other than "the public interest" is commendable. This will notably enable cultural heritage institutions to act for commercial purposes and enter into private agreements with third organisations. However there is a need to provide some legal safeguards in respect of such private agreements; most notably rules ensuring that access to works remains unrestricted for the general public.

Presidency compromise proposal

On the 6th of October 2011, the Council of the European Union has published a presidency compromise proposal 2011/0136 (COD) that proposes a number of changes to COM/2011/0289 as proposed by the Commission. This compromise proposal introduces language that would partially fix some of the technical issues identified above (in particular some of the concerns raised with regard to article 1 sub 2 and the issue identified with regard to article 2).

⁴ Recommendation # 7: The Public Domain needs to be protected from the adverse effects of Technical Protection Measures. Circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works. The deployment of TPMs to hinder or impede privileged uses of a protected work or access to public domain material must be sanctioned.

COMMUNIA also welcomes the proposal to remove the word 'existing' from recital 20, as this will ensure that ECL solutions for the problems encountered by mass digitisation can be further examined.

However, the presidency compromise proposal also contains proposals for changes that would further weaken the Commissions proposal. The proposed removal of Article 7 further restricts the scope of the Commission's proposal that is already severely limited in scope. Instead of embracing the opportunities created by digitisation and online access to content, the compromise proposal even further restricts the possible uses of orphaned knowledge and culture.

This restrictive approach is visible throughout the presidency compromise proposal: The amendments to recital 16 explicitly aim at creating a strong legal uncertainty for users of orphan works, affirming the need to subject them to copyright infringement actions in case of "negligent" searches, a notion that is by nature ill defined. This statement is much stronger than the corresponding substantive provisions in art 6.4 for instance.

Moreover, that proposed addition of Article 6 sub. 5 ('Member States may provide that a remuneration is due to right holders that put an end to the orphan status of their works for the use that has been made of such works.') would have a very similar effect, as it will create continued financial uncertainty for users of recognized orphan works. With this amendment accepted, the directive would provide users of orphan works with very little practical benefits over the status quo.

The new Article 6 of the Presidency compromise proposal is further limiting the scope of action of permitted users. By saying that permitted uses shall only concern orphan works "contained in their collections" (Art. 6, sub. 1), the practical implementation of the newly created exception is deemed to apply to a restricted number of works. Such a situation would not be adapted to the activity of institutions such as libraries or museums, aiming at enlarging their collections.

Where a work has more than one rights-holder, some of them being identified or located, Article 2.2 of the Presidency compromise provides for a status of partially orphaned work, or more precisely for a presumption of orphan works in respect of the non-identified/located rights holders. Although this approach addresses the most glaring shortcoming of the Commission proposal, difficulties in the implementation of the status of partially orphaned works can be foreseen, risking to add to the legal uncertainty to be borne by users of orphan works.

Finally, it is interesting to note that the Presidency draft proposes to amend Article 6 by specifying that the rights created by this article need to be implemented by providing 'an exception or limitation to the reproduction and the making available rights provided for in Article 2 and 3 of Directive 2001/29/EC'. This has the potential to strengthen the position of users that benefit from Article 6. However, the Council and the Parliament fail to provide the necessary guidelines of construction for the new copyright exception, which carries the risk

of the legal uncertainty, to the detriment of users of orphan works as well as the risk of heterogeneous implementation across Member States.

The introduction by the compromise proposal of a new exception must also be read as recognition that the exhaustive list of extension and limitations of the copyright directive needs to be reviewed and opened, in order to deal with the opportunities offered by the digital environment. This is in line with the second part of COMMUNIA policy recommendation #3:

Recommendation # 3: Harmonize Exceptions and Limitations of the Copyright Directive among the Member States and open up the exhaustive list so that the user prerogative can be adapted to the ongoing technological transformations

Additional considerations

Two other COMMUNIA policy recommendations relate to the issue of orphan works. Policy recommendation #8 provides for a mechanism that would – among other things – prevent future orphan works. Where the proposed directive identifies the need for a registration mechanism for recognized orphan works, COMMUNIA goes a step further to propose a registration mechanism for all works covered by copyright (and related rights):

Recommendation #8: In order to prevent unnecessary and unwanted protection of works of authorship, full copyright protection should only be granted to works that have been registered by their authors. Non-registered works should only get moral rights protection.

Finally, memory institutions face other barriers to executing their public interest mission online beyond the orphan works status concerning significant parts of their collections. These institutions struggle to establish online services that provide access to their collections that is comparable to their off-line activities. In the off-line environment, Europe's memory institutions have flourished thanks to substantial limitations and exceptions. These benefits are largely absent in the on-line environment and as a result many of Europe's memory institutions are unable to maximize the potential that has been created by near universal online access:

Recommendation #10: Memory Institutions must be enabled to fulfil their traditional function in the online environment. In order to be able to provide access to knowledge and culture they must benefit from compulsory and harmonized exceptions and limitations that allow them to make their collections available online for non-commercial purposes.

For further information please contact the COMMUNIA Association's Orphan works working group at communia.association@gmail.com