



Proposal for a Directive on certain permitted uses of orphan works

A memorandum addressed to the Council of the European Union by Information Sans Frontières

Summary

Information Sans Frontières is an alliance representing the institutions in the Member States addressed by the proposed Directive. We urge that the Directive should embrace unpublished as well as published works, and creative works in all media. We are unanimously of the view that the Directive is in danger of failing to achieve its policy objectives, in particular large-scale digitisation projects. The Presidency compromise proposal has several inherent contradictions with respect to the purpose of the Directive.

- It is too prescriptive of the methods to be used by the target institutions, insisting on procedures that in some cases will be impracticable
- It is insufficiently hospitable to solutions based on licensing, which are mentioned briefly in Recital 20 but which have no legislative support in the following Articles in order to allow them to function across borders
- It seeks to modify the exceptions contained in Directive 2001/29/EC by adding further restrictions on the freedom of action of the target institutions
- It prescribes over-burdensome methods for institutions to publish their records

1 Policy objectives

The principal objective of the Directive is **large-scale digitisation projects** by public institutions. The intention of such projects is to make European culture more widely available, both for the benefit of European citizens and also to encourage commercial-sector developments. A crucial element of this is cross-border use, as recognised by Article 4.

Commissioner Kroes said at the recent Frankfurt Book Fair: *'Public authorities can build demand for commercial digital content. The Directive we have proposed on Orphan Works, currently before the Council and Parliament, will help do this: although targeted chiefly at public-interest works, the **large-scale digitisation** which results will help build a user base that can also become a driver of demand for commercial digitised works.'*

The intention of the Directive, explicitly stated in Recital 1, is clearly **'large-scale digitisation'**. **Large-scale digitisation was the clear focus of the impact assessment of the proposed Directive (SEC (2011) 615).**

2 Impractical detail

Whilst we welcome the broad coverage of institutions within the scope of the Directive (though we urge that all broadcasting organisations should be included), we believe that an insistence on diligent search for each work (Article 3.1) is an unnecessarily detailed requirement, which might lead, for example, in a library digitisation project, to the impractical approach of a page-by-page examination of every book on every occasion. The same can be said for the provision that embedded works shall themselves be considered separate works for this purpose.

Orphan works are of many kinds and exist in many kinds of institutional collections. The nature of the diligent search should be left to the discretion of the professional institutions concerned, which may use detailed catalogue information in databases. **The terms 'diligent search', 'good faith' and 'reasonable' in the Directive are sufficient safeguards for potential re-appearing rightholders.**

3 Inadequate provision for licensing solutions

Solutions based on licensing, though they may not suit all Member States, have some clear advantages. Their in-built provision for payment and/or independent supervision by a third party is self-evidently beneficial to the position of a reappearing rightholder. **Licensing needs to be a structural option in the Articles of the Directive.** For licences (as foreseen by Recital 20) to have cross-border effect, **Article 4 on mutual recognition will need amendment to accommodate licensing solutions also.**

4 Importance of safeguarding the provisions of the InfoSoc Directive

Nothing in the objectives of the proposed Directive justifies amending the substantive provisions of Directive 2001/29/EC. Yet the Presidency compromise seeks to alter its terms retrospectively by the addition of qualifying purposes in its reference to Article 2 of that Directive. **The restricted purposes enumerated in Article 6.1 (b) of the orphan works Directive should be deleted;** and indeed **a new Recital should provide that the present Directive, while authorising a new exception or limitation for the use of orphan works, is without prejudice to the existing provisions of Directive 2001/29/EC.**

5 Administrative burden to be reasonable

The administrative requirements for the publication of institutional records have been successively expanded. Over-specified methods of publication raise the cost of digitisation to unsustainable levels. The requirements of the Directive should be **simplified to maintaining a record, accessible to the public, of searches performed, and naming any known rightholder in any use of a work.**

6 Conclusion

Little will be gained for the European Union by an unworkable legal provision. As the target institutions of the Directive, we urge the adoption of the changes we suggest here. Otherwise we believe it is no exaggeration to say that the effect of the proposed Directive will be negligible for all practical purposes.

Information Sans Frontières is an alliance formed by:

EUROPEANA – Digital portal, funded by the EU and member states, creating access to digital content from museums, libraries, art galleries, archives and audio-visual collections across Europe
www.europeana.eu

EBLIDA- European Bureau of Library, Information and Documentation Associations www.eblida.org

JISC – The Joint Information Systems Committee of the UK's higher education funding councils -
www.jisc.ac.uk

LIBER – Association of European Research Libraries www.libereurope.eu

Information Sans Frontières contacts:

Toby Bainton , Senior Policy Adviser
Tel: +44-7961-323-597
E-mail: toby.bainton@btinternet.com

Helena Lovegrove, Public Affairs Director
Tel: +32-486-948-212
E-mail: helena@lovegrove.eu