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The Commission's Proposal for a Directive on Orphan Works

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On 24 May 2011, the European Commission announced a proposal for a directive on 'certain permitted uses of orphan works'. This title perfectly conveys the scope of the proposal. Rather than adopting a generic approach to deal with the problem of orphan works, the Commission comes up with a set of measures designed for specific situations in which the problem is considered to be particularly urgent, namely, in relation to mass digitisation projects. This follows from the Commission's objective to create a legal framework to ensure the lawful cross-border online access to orphan works contained in online digital libraries or archives and used in the pursuit of the public interest mission of particular cultural heritage institutions.

The proposal accordingly has a limited scope. It applies only to specific works contained in the collections of publicly accessible libraries, educational establishments, museums, archives (i.e. works published in the form of books, journals, newspapers, magazines or other writings) or film heritage institutions (i.e. cinematographic or audiovisual works) or produced by public service broadcasting organisations before the 31 December 2002 and contained in their archives (i.e. cinematographic, audio or audiovisual works). Hence, the proposed does not apply to orphan works that are not contained in a collection of one of these organisations. Also, because it extends only to the categories of works mentioned, other protected subject matter, including phonograms and stand-alone photographs and images, is explicitly excluded from its scope.

Moreover, the proposal only brings relief to the relevant cultural heritage institutions that hold orphan works in their collections. It does not help other persons using orphan works, such as film makers incorporating such works in a documentary film. For the latter types of users, the scale of the problem in absolute terms may perhaps be not as large as for mass digitisation projects, but the impact of the problem can certainly be higher. Whereas orphan works contained in an online digital library or archive can simply be removed from the relevant database once a right holder comes forward, omitting orphan works from a documentary film may well render the entire film worthless. Because right holders may reappear and seek injunctive relief, it can be very risky to use orphan works in a film (or other transformative or derivative work).

Also, the scope of the proposal is limited to works first published or broadcast in a Member State. This may endanger the practical application of the proposed directive, as for many orphan works, it may not be easy to determine the country of first publication or broadcast. Even so, the proposal requires the search for right holders to be carried out in the Member State where the work was first published or broadcast. In practice, this means that cultural heritage institutions may need to perform searches in multiple Member States. The search results must be recorded in a publicly

accessible database in the Member State where the search was executed.

Given the focus on mass digitisation projects, it may appear remarkable that the proposal is premised on the requirement to make a diligent search for right holders on an individual (i.e. work-by-work) basis. This follows from the definition of "orphan work" as a work the right holder of which is not identified or, if identified, has not been located after a diligent search has been carried out and recorded (whereby a work is not considered to be an orphan work where it has multiple right-holders and one of them has been identified and located). As mass digitisation by definition requires rights clearance for many, perhaps even tons of, works, the Commission could as well have come up with a solution based on collective agreements, such as an extended collective licensing model. However, as can be read in the Impact Assessment accompanying the proposal, the Commission found this option undesirable, inter alia, because it does not coexist with the principle of EU-wide mutual recognition of orphan works, something which the Commission advocates in the current proposal (see below).

The required "diligent search" is outlined in detail in the proposal and includes consultation of the appropriate sources for the category of works in question. What these are must be determined by each Member State, in consultation with right holders and users. They must include, as a minimum, the sources listed in the Annex to the proposal. In any case, cultural heritage institutions must maintain records of their diligent search and publicly accessible records of their use of orphan works. Whether and to what extent cultural heritage institutions holding identical orphan works in their collections may rely on the search results of other institutions, without conducting a proper search for the right owner themselves ("piggybacking"), is not specified in the proposal.

Once a work, in accordance with the proposal, is considered an orphan work in one Member State it shall be recognized as an orphan work in the other Member States. This means that a cultural heritage institution that fails to identify or locate the right holder(s) of a work after a diligent search can use the work across Europe without the need to validate the orphan status of the work in each and every Member State. Pursuant to the proposal, the institution would be permitted to make the orphan work available to the public and to reproduce it. However, orphan works may not be used for purposes other than the public interest missions of preservation, restoration and the provision of cultural and educational access to works contained in the collections of the cultural heritage institutions. Member States may authorize the use of orphan works for other purposes, but only under specific conditions. This includes the requirement of indicating, where possible, the right holder's name in any use of the work and of remunerating right holders that reappear for the usage made. Claims for remuneration must be made within a period fixed by Member States, not less than five years from the date of the act giving rise to the claim.

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