

Kluwer Copyright Blog

Trilogue agreement on the Orphan Works Directive

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Literary works, photos, films and music and other items that constitute our common cultural heritage are stored in the collections of cultural institutions, such as publicly accessible libraries, museums and archives. Many of these items are still protected by copyright, but their right holders cannot be identified or located – i.e. the works are so-called “orphan works”. This leads to a situation where cultural institutions that strive to digitize and make the parts of their collections still “in copyright” available via the internet risk being sued for infringement if the rightholders should reappear. This may cause many cultural institutions to refrain from digitizing and making available their collections, which would hamper the development of [Digital libraries](#) such as [Europeana](#), to the detriment of the public at large. This problem has been brought to the attention of legislators in [Europe](#) and [elsewhere](#).

Following a [Green Paper](#) and a [Communication](#) discussing different means to solve the matter, the European Commission last spring put forward a [proposal](#) on a Directive on certain permitted uses of orphan works. The proposal has since been subject to negotiations in the [Council](#) and the European [Parliament](#). On Wednesday last week an [informal deal](#) was [struck](#) between the Parliament and the Council, together with the Commission, on an “[agreed text](#)” on an orphan works directive. To enter into force, the directive now has to be approved by the Parliament’s Committee on Legal Affairs (JURI), the plenary of the Parliament and the Council. This blog post will briefly describe and comment on the agreed text.

The agreed text

According to the agreed text, the Member States shall introduce an exception or limitation for the purpose of digitization and online dissemination of orphan works in the collections held by certain cultural institutions. The acts may only be carried out in order to achieve the institutions’ public interest missions, such as preservation, restoration and cultural and educational access to their collections.

A work or other subject matter shall be considered an orphan if all the rightholders have not been identified or, even if identified, not located despite a *diligent search* for the rightholders. The diligent search has to be carried out *prior* to the use of *each* work or other protected subject matter.

The diligent search shall be carried out by an institution in the Member State of first publication or, in the absence of publication, first broadcast. If the work or other subject matter has not been published or broadcast but has been made publicly accessible by an institution with the consent of

the rightholder, the diligent search shall be carried out in the Member State where this institution is established. To promote multi-territory pan-European access, the agreed text includes a provision on *mutual recognition*. According to this provision, a work or other subject matter which has been deemed an orphan in the Member State of first publication etc., shall be considered an orphan in all Member States. An orphan may thus be used in all Member States (to the extent permitted by the limitation/exception introduced by the Directive).

When carrying out the diligent search, the cultural institutions have to consult appropriate sources for the category of works and other protected subject matter in question. The Member States are provided with some leeway in determining the “appropriate” sources, although the search must include certain sources listed in an Annex to the Directive.

The institutions may generate revenues in the course of the permitted use, but only to the extent those revenues serve the purpose of covering the institution’s costs of digitizing and making available the orphans.

If the right holder were to re-appear, he or she must have the possibility of putting an end to the orphan status insofar as his/her rights are concerned. He or she is also entitled to a “fair compensation” for the use that has been made by the cultural institution(s). However, if a work or other subject matter has been wrongly found to be an orphan work, i.e. following a search which was not diligent, the remedies for copyright infringement in national law shall remain available.

Comments

As has been recognized by [bloggers](#) and other [media](#), the agreed text establishes legal certainty for cultural institutions that seek to digitize and make orphans in their collections available across the EU. However, the agreed text does probably not solve the problem of high transaction costs for mass-digitization projects as the diligent search has to be carried out for each work prior to any use. This is a concern that the [community of libraries](#) and other cultural institutions, and [several legal scholars](#), have raised during the negotiations. On the other hand, representatives of [right holders](#) have stressed the importance of a thorough due diligence for each work.

That the agreed text does not primarily take aim at large mass digitization projects is also reflected in the preamble, which holds that the directive is without prejudice to specific [solutions being developed](#) in the Member States to address larger mass scale digitization issues. In addition, one of the articles and the preamble hold that the directive does not interfere with any arrangements concerning the management of rights at national level – such as [extended collective licensing](#). Also, the preamble makes explicit reference to the [Memorandum of Understanding](#) on key principles on the digitization and making available of out-of-commerce works which was [brokered](#) by the Commission last year. Hence, one could say the Directive provides a solution with legal certainty for smaller digitization projects or projects with a high budget to carry out diligent search on a large scale.

The cross-border mechanism (mutual recognition) is a legislative innovation in this field of law. Contrary to speculation by some [commentators](#), the solution will probably not lead to “forum shopping” as there will only be one competent Member State where the due diligence can be carried out (for each work or other subject matter).

It is helpful that the agreed text, as opposed to the proposal by the Commission, elucidates that the provision on the cultural institutions’ digitization and online dissemination of orphan works is to be

regarded as “an exception or limitation”. This was a major flaw in the proposal by the Commission. This clarifies that the mechanism is subject to the three-step test, something that is recognized in the preamble. Leading legal scholars had [criticized](#) the initial proposal for lack of clarity and coherence with international obligations in this regard. It remains to be seen if the provisions in the agreed text (as transposed into national law in the Member States) will pass muster in relation to international obligations, e.g. as regards the provision on *reduced* compensation if the right holder would (re)appear and the scope of the exception/limitation (i.e. permitted acts).

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