Kluwer Copyright Blog

Are European orphans about to be freed?

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Last week, the European Parliament approved the draft Directive on certain permitted uses of orphan works. The approval of the Council of Ministers is expected to occur shortly.

This is big news indeed, for it's the first draft directive in the area of copyright law to make it this far in more than 10 years. It's been commented and reported by many.

The proposed directive is striking in many respects. Most prominent is the virtually unanimous opinion that the directive 'is a step in the right direction', but that it 'will not facilitate nor promote mass digitization and large-scale preservation of Europe's vast cultural heritage'. This conjures up the image of the elephant giving birth to a mouse.

The text of the proposed directive went through several iterations before reaching its current stage, including the last amendments brought by the Parliament to the compromise text of last July. Some of the sharp edges have been softened in response to criticism, but the main point of contention remains: how can a cultural heritage institution with millions of items in its collection proceed with digitization if it must conduct prior to use a diligent search for each item? Since this train could not be stopped, cultural heritage institutions are now looking in the direction of their own lawmakers and partner-stakeholders to determine what constitutes a 'diligent search' at national level, following the criteria they may establish pursuant to article 3(2) of the directive.

The fair compensation to the reappearing rights holder

Another issue left at the discretion of the individual Member States concerns the determination of the circumstances under which the payment of a fair compensation to the rights holders that put an end to the orphan status of a work is to be organised. Article 6 paragraph 5 of the proposed directive states that the 'level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation which uses the orphan work in question is established'. Recital 18 specifies that 'for the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the organisations

in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rights holders'. In practice, the combination of all these factors could justify the payment of a very low compensation, one that would still qualify as fair.

What the proposed directive omits to mention is how the compensation for past use based on mutual recognition of orphan works status (art. 4) should be regulated. Since the proposed directive emphasises that a work or phonogram so recognised may 'be used and accessed in accordance with this Directive in all Member States', does it give a right to fair compensation to the reappearing rights holder in every single Member State? A prudent legislator would, when implementing this provision at national level, make necessary arrangements to avoid that the budgets of its cultural heritage institutions be plundered by reappearing foreign rights holders. The determination of what is 'fair compensation' in this case could be linked – in addition to the factors enumarated in Recital 18 – to the total amount of downloads of the work/phonogram in question (actual use) in the Member State. The rights holder of a more popular work/phonogram would therefore receive a higher compensation than one whose work/phonogram hardly was consulted. This element would actually be connected to the criterion of potential 'harm' to the interests of the rights holder.

The registry of search records and orphan status

A (somewhat surprising) novelty in the compromise text as approved by the Parliament is the appointment of the Office for Harmonisation in the Internal Market (OHIM) as the publicly accessible online database entrusted with the collection and maintenance of the diligent search records and outcomes for all works declared orphan. Of course, the OHIM is among the few pan-European institutions dealing with intellectual property rights, namely trademarks and designs (the other organization in the field would have been the Commmunity Plant Variety Office) and it certainly has experience with holding registries. But the OHIM has no experience or affinity with copyright protected works or phonograms.

Dealing with trademark and design registration is likely very different from dealing with research records and metadata reflecting the orphan status of works. Moreover, the OHIM is not the first place that comes to mind to look for information on orphan works. Consequently, it could be overlooked by all those who are not familiar with the specifics of this arrangement, e.g. the general public. Wouldn't it have been more logical to appoint an organisation like Europeana, which is mentioned in Recital 1 of the proposed directive as the main beneficiary of the provisions contained therein.

The 'legal certainty' 'without prejudice to'…

The most striking aspect of the proposed directive is that in its effort to ensure 'legal certainty with respect to the use of orphan works' (Recital 25), the application of the provisions is ***without prejudice to*** the following:

1. the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on 20 September 2011 (Recital 4);
2. the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representatino or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation (Recital 24);
3. any arrangements concerning the management of rights at national level (art. 1(5));

4. national provisions on anonymous or pseudonymous works (art. 2(5));
5. provisions concerning, in particular, patent rights, trade marks, design rights, utility models, the topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, the protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract, and rules on the freedom of the press and freedom of expression in the media (art. 7);
6. any acts concluded and rights acquired before (a certain date) (art. 8(2));

In addition to all these rules or arrangements that may be given precedence over those of the proposed directive, whenever dealing with musical works, a cultural heritage institution will have to take account of the future rules deriving from the proposed directive on collective rights management and multi-territorial licensing of rights in musical works for online uses.

All and all, not an easy task ahead for the main beneficiaries the provisions of the proposed directive on certain permitted uses of orphan works… Cultural heritage institutions may choose instead to stick to the 'contractual method'… which may not bring much freedom to European orphans after all.

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