



Dear Member of the European Parliament,

We are writing you on behalf of European writers and translators as well as press, book, journals publishers.

We note that concerns raised recently by some public institutions (originally prepared by *Information Sans Frontières*) in a letter to some MEPs are already addressed in the draft Directive on Orphan Works, as well as in the Council's compromise proposal of 10 February 2012¹, and by comments from MEPs. We fail to see that the initiative brings anything new into the discussions; most of the issues being already properly addressed by the Parliament and the Council working on the draft Directive.

However, we regret we are not able to comment on the latest European Parliament's amendments as they have not yet been made public. We therefore rely on the Council's text as we are aware that the two institutions are working towards the adoption in one reading.

Firstly, contrary to certain allegations, the **diligent search** does not aim at protecting lost rightholders, but rather at being sure not to include, as a result of negligence, the works of known and identifiable rightholders. The Directive thus enables libraries to limit their liability, since orphan works are still subject to copyright. However, in order to do so, libraries must be certain that the works are really orphan works. As long as a work is truly an orphan work, rightholders have no problem with it being made available to the public.

In order to make sure that the works are really orphans, a diligent search has to be performed. If this is not the case, then works which are not orphans will be included in the digital offer of the public institutions and rightholders deprived from any further means of exploiting their own work. To give a concrete example, HathiTrust set by the University of Michigan as well as four other US universities published online approximately seven million books, which were still protected. Before publishing them online, a "diligent search" had been made, but obviously under insufficient criteria, since

¹ <http://register.consilium.europa.eu/pdf/en/12/st06/st06191.en12.pdf>

numerous authors were either still living or had died recently and could have been easily found thanks to a simple search on a search engine². This is why we insist on a definition of the diligent search criteria, which must be defined at the national level, in **agreement** with rightholders, and not only by mere consultation of rightholders.

Together with national libraries of a number of Member States, the rightholders of the book- and image-based sector created **ARROW**³, a very useful and innovative tool, which enables to make an easy, rapid title-by-title diligent research. The British Library published a report in September 2011, demonstrating that ARROW enables librarians to make a diligent search per book in five minutes instead of four hours, and which strongly recommends using that tool as a technical solution for the diligent search⁴.

We are therefore committed to reiterating our commitment to the valuable, essential concept of diligent search. This concept must not be weakened if there is to be a legislative tool, which is both balanced and copyright-compliant. Every copyright-protected work should benefit from the same protection, regardless of its nature, cultural or commercial significance, which is necessarily very subjective.

Secondly, **commercial funding** of digitisation projects is already explicitly enabled in the draft Directive, as public institutions are allowed to establish partnerships with commercial partners, with the intent of financing their digitisation projects, as stated in Recital 18 and Article 6 (3). Nonetheless, it is equally essential not to allow any commercial practice through the Directive, which aims at making orphan works available via public institutions in the context of their public tasks, and that private stakeholders do not obtain any exclusive right or permission to use or control the use of orphan works, as outlined in Recital 18.

Thirdly, as far as far as requirement for recording the diligent search, outlined in the recent Council non-paper on a single database for orphan works, prepared by the Danish Presidency on 22 February 2012⁵, the Presidency clarified that the aim of Article 3 is to ensure that any obligation on Member States or beneficiaries constitutes the smallest burden possible, thus allowing Member States to keep databases as simple as possible, and requiring beneficiaries **to provide no more information than strictly necessary**. However, it also needs to be ensured that the results of the diligent search should appear in a register, which should be available to rightholders in the country where the work was first published, in order to enable rightholders to make sure that their works have not been digitised and made available as a result of negligence, especially in a foreign country. This will also avoid the duplication of digitisation efforts, while making it possible for libraries to make sure that a work has not yet been made available.

Fourthly, Recital 6 of the last Council compromise proposal states clearly that “ensuring the mutual recognition of such status is appropriate, since it would allow access to the orphan works in all Member States.” Similarly, Article 4, as contained in the same Council proposal, adds that a work considered an orphan work in one Member State shall be considered an orphan work in all Member States “and may be used and accessed in accordance with this Directive in all Member States”. Equally, Recital 19 states clearly that publicly accessible institutions should be able to make the orphan work **available to the public in other Member States**. Moreover, Recital 20 highlights that the Directive is **without prejudice to the arrangements in the Member States** concerning the management of rights, including for mass digitisation purposes.

² http://www.ifrro.org/sites/default/files/authors_v._hathitrust_amended_complaint_06_oct_2011.pdf

³ www.arrow-net.eu

⁴ <http://pressandpolicy.bl.uk/ImageLibrary/detail.aspx?MediaDetailsID=1197>

⁵ <http://register.consilium.europa.eu/pdf/en/12/st06/st06505.en12.pdf>

As regards the books and learned journals's sector, this is specifically mentioned as an example in the letter of "Informations sans Frontières", with "books discussing the chances of war, published 1910-1913". These books will be catalogued in the national bibliographies of the respective countries of publication, if they are still commercially available, the metadata will appear in the national 'books in print' databases and the writers, illustrators and publishers might be members of the national collective management organisations. This is why we have set up the ARROW project (see above) making it feasible to perform a diligent search to single out orphan works from works whose rights holders can be identified and asked permission to use the works.

Please feel free to contact us if you have any questions about this letter. We would be delighted to meet you and elaborate further on our position.

Yours sincerely,

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