

Orphan works: permitted uses

2011/0136(COD) - 13/09/2012 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 531 votes to 11 with 65 abstentions, a legislative resolution on the proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works.

Parliament adopted its position in first reading following the ordinary legislative procedure. The amendments adopted in plenary are the result of a compromise negotiated between Parliament and Council. They amend the Commission proposal as follows:

Copyright as the basis of innovation: as suggested by Parliament, the amended text stresses that copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. Mass digitisation and dissemination of works is therefore a means of protecting Europe's cultural heritage. It also recalls that copyright is an important tool for ensuring that the creative sector is rewarded for its work.

Purpose and scope: the Directive concerns certain uses of orphan works undertaken by publicly accessible libraries, educational establishments or museums as well as by archives, film and audio heritage institutions, publishers and public service broadcasting organisations **established in the Member States, in order to achieve aims related to their public-interest missions.**

The Directive applies to:

- works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions;
- cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and
- cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives which are protected by copyright or related rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.

Orphan works:

- a work or a phonogram shall be considered an orphan work **if none of the rightholders** in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded;
- **where there is more than one rightholder** in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and, the work or phonogram may be used in accordance with the Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in the Directive to carry out the acts of reproduction and making available to the public covered Directive 2001/29/EC.

Diligent search:

- a diligent search must be carried out **in good faith prior to the use of the work or phonogram**;
- a diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence;
- if there is evidence to suggest that relevant information on rightholders is to be found in **other countries**, sources of information available in those other countries shall also be consulted;
- the organisations referred to in the Directive must **maintain records** of their diligent searches and provide information to the competent national authorities showing that that a work or a phonogram is considered an orphan work;
- the information on the diligent searches must be recorded in a single **publicly accessible online database** established and managed by the Office for Harmonisation in the Internal Market.

End of orphan work status: a rightholder in a work or phonogram considered to be an orphan work must have, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned.

Permitted uses of orphan works:

- the organisations may generate **revenues** in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public. The organisations shall indicate the name of identified authors and other rightholders in any use of an orphan work;
- a **fair compensation** must be due to rightholders that put an end to the orphan work status of their works or other protected subject matter for the use that has been made of such works and other protected subject matter in accordance with the Directive. Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. 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 that uses the orphan work in question is established.

Review: the Commission shall submit 3 years after entry into force of the Directive and at annual intervals thereafter, a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope.