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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain permitted uses of orphan works

(Text with EEA relevance)

{SEC(2011) 615 final}

{SEC(2011) 616 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Prior authorisations are necessary to make works protected by copyright available to the public in an online digital library or archive. When the relevant copyright owner cannot be identified or found the works in question are known as orphan works. Consequently, the necessary authorisations to make available works online cannot be obtained. Libraries or other institutions that make works available online to the public without prior authorisation risk infringing copyright.

The main objective of this proposal is to create a legal framework to ensure the lawful, cross-border online access to orphan works contained in online digital libraries or archives operated by a variety of institutions that are specified in the proposal when such orphan works are used in the pursuance of the public interest mission of such institutions. Such works include works which are published in the form of books, journals, newspapers, magazines or other writings, including works embedded in them, as well as audiovisual and cinematographic works in the collections of film heritage institutions, and audio, audiovisual and cinematographic works contained in the archives of public service broadcasting organisations and produced by them. With regard to the archives of public service broadcasters and the special position of public service broadcasters as producers there is a need to limit the phenomena of orphan works by providing a cut off date for works that are within the scope of the proposal.

This aim is to be achieved through a system of mutual recognition of the orphan status of a work. In order to establish the "orphan work" status, libraries, educational establishments, museums or archives, film heritage institutions and public service broadcasting organisations are required to carry out a prior diligent search, in line with the requirements specified in the proposed directive, in the Member State where the work was first published. Once the diligent search establishes the "orphan status" of a work, the work in question will be deemed an orphan work throughout the EU, obviating the need for multiple diligent searches. On this basis, it will be possible to make orphan works available online for cultural and educational purposes without prior authorisation unless the owner of the work puts an end to the orphan status.

This initiative builds on the Commission's 2006 Recommendation on the digitisation and online accessibility of cultural content and digital preservation¹. Despite the Recommendation, only a handful of Member States have implemented orphan works legislation. The few existing national solutions are circumscribed by the fact that they limit online access to citizens resident in their national territories.

The creation of a legal framework to facilitate the cross-border digitisation and dissemination of orphan works in the single market is also one of the key actions identified in the Digital Agenda for Europe² which is part of the Europe 2020 Strategy³.

¹ Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation (OJ L 236, 31.8.2006, p. 28-30).

² A Digital Agenda for Europe - COM(2010) 245.

³ Europe 2020: A strategy for smart, sustainable and inclusive growth:
http://ec.europa.eu/eu2020/index_en.htm

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

• Consultation of interested parties

In 2006, a High Level Expert Group on Digital Libraries was established bringing together stakeholders concerned with digitization and online accessibility of cultural material, including orphan works⁴. The Group adopted a "Final Report on Digital Preservation, Orphan Works and Out-of-Print Works"⁵. A "Memorandum of Understanding on Diligent Search Guidelines for Orphan Works" was signed by representatives of libraries, archives and rightholders⁶.

In 2008, the Commission's Green Paper on Copyright in the Knowledge Economy⁷ sought the views of stakeholders on, *inter alia*, the necessity of further action in relation to orphan works⁸. On 19 October 2009, the Commission adopted the follow-up Communication on Copyright in the Knowledge Economy⁹ in which it announced that it would carry out an impact assessment on how to deal with orphan works in the EU.

On 26 October 2009, the Commission held a public hearing where all interested parties presented their views on orphan works. On 10 November 2009, the Swedish Presidency and the European Parliament organised a joint hearing on orphan works and access to works for the visually impaired.

Throughout 2009-2010, the Commission services held meetings with a variety of stakeholders on a bilateral basis to discuss the relevant issues in more detail.

• Impact assessment

The impact assessment analyses six options: (1) do nothing, (2) a statutory exception to copyright, (3) extended collective licensing, (4) an orphan-specific licence granted by collecting societies, (5) an orphan-specific licence granted by a public body, and (6) the mutual recognition of national solutions regarding orphan works.

All policy options (except Option 1) are premised on the adoption of a directive that will require all Member States to enact specific orphan works legislation within a specified timeframe. All policy options, except Option 3, are premised on the requirement that a diligent search is necessary prior to the making available of an orphan work in an online digital library.

⁴ Commission Decision of 27 February 2006 on setting up a High Level Expert Group on Digital Libraries (OJ L 63, 4.3.2006, p. 25-27). The Group was subsequently renewed by Commission Decision of 25 March 2009 (OJ 82, 28.3.2009, p. 9-11).

⁵ http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/index_en.htm

⁶ http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf

⁷ COM(2008) 466.

⁸ Responses to the consultation are available at http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/consultation_copyright&vm=detailed&sb=Title. See Annex, Chapters 1 and 2 for the analysis of the responses.

⁹ COM(2009) 532.

The statutory exception (Option 2) would avoid the burden of obtaining a copyright licence but maintain the prior diligent search. However, this option provides for less legal certainty as there is no third party certification of the diligent search.

Option 3, the model of "extended collective licences" assumes that, once a collecting society authorises a library to make books available on a website, this licence, by virtue of a statutory extension, will cover all works in that category, including orphan works (i.e., books, films). The collecting society is considered to represent such "outliers" independent of whether it has carried out a diligent search to identify or locate the author. The absence of a diligent search prevents an approach based on mutual recognition of the orphan work status. An extended collective licence is also normally only valid in the national territory in which the statutory presumption applies.

The specific licence for orphan works (Option 4) provides libraries and the other beneficiaries with a high level of legal certainty against damage claims by reappearing owners. This option requires both a diligent search to determine the orphan status prior to the granting of the licence and a specific licensing arrangement pertaining to orphan works.

The government licence covering orphan works (Option 5) constitutes a public certification of the diligent search and thus grants a high level of legal certainty to the digital library. But this certainty comes at a price in terms of administrative burden. This is why earlier incarnations of this system have had limited impact and are not used in relation to large scale digital library projects.

An approach based on mutual recognition of the orphan status (Option 6) allows libraries and other beneficiaries to enjoy legal certainty as to the "orphan status" of a particular work. Mutual recognition ensures that the orphan works contained in a digital library would be available to citizens across Europe.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The proposal deals with the diligent search necessary to identify whether a particular work is an orphan work and, once this has been established, to make it legal to make this work available to the public online under certain conditions and for specific purposes. The proposal also clarifies the application of extended collective licences to works which are potentially orphan works.

- **Legal basis**

Article 114 TFEU

- **Subsidiarity principle**

A legislative proposal in the form of a directive is necessary because voluntary approaches, notably Commission Recommendation 2006/585/EC of 24 August 2006, have not produced the desired result. In addition, the coexistence of uncoordinated national approaches

governing orphan works in online libraries makes it difficult for a library to make orphan works available across EU Member States¹⁰.

- **Proportionality principle**

Because the orphan work problem is a major impediment to the creation of digital libraries, a coherent EU framework for online access to orphan works is the least intrusive option to achieve the desired result. All other approaches would require significantly more administrative overhead and licensing infrastructures just for orphan works.

- **Choice of instruments**

Proposed instrument: Directive.

Main articles of the proposal

Article 1 sets out the scope and subject matter of the Directive as a variety of material contained in public libraries, educational establishments, museums and archives as well as in the collections of film heritage institutions and archives of public service broadcasting organisations. In the print sector, it also covers visual works such as photographs and illustrations contained in these published works.

Article 2 contains the definition of an orphan work. The definition of an orphan work incorporates the requirement of a diligent search.

Article 3 explains how the diligent search is to be carried out by those who are permitted to use orphan works. Article 3 clarifies that a diligent search need only be carried out in the Member State of first publication of the work.

Article 4 establishes the principle of mutual recognition whereby a work deemed to be an orphan work after a diligent search carried out in accordance with Article 3 shall be considered an orphan work in all Member States.

Article 5 concerns the possibility to put an end to the orphan work status.

Article 6 enumerates the uses that the named beneficiaries are permitted to undertake with respect to orphan works (to make them available to the public, within the meaning of Article 3 of Directive 2001/29/EC, and to reproduce such works, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of achieving their public interest mission).

Article 7 specifies how Member States may permit certain additional uses under specific conditions.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Union budget.

¹⁰ In some Member States, e.g. France, preparatory work on a legislative solution expressly acknowledges that a European solution is required - Conseil Supérieur de la Propriété Littéraire et Artistique *Commission sur les œuvres orphelines*, p. 19.

5. OPTIONAL ELEMENTS

- **European Economic Area**

The proposed act concerns an EEA matter and should extend to the European Economic Area.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 49, 56 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Libraries, museums, archives, educational establishments, film heritage institutions and public service broadcasting organisations are engaged in large-scale digitisation of their collections or archives in order to create European Digital Libraries. Libraries, museums, archives, educational establishments, film heritage institutions and public service broadcasting organisations in the Member States contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. Technologies for mass scale digitisation of print materials and for search and indexing enhance the research value of the libraries' collections.
- (2) The need to promote free movement of knowledge and innovation in the internal market is an important component of the Europe 2020 Strategy, as set out in the Communication from the Commission "Europe 2020: A strategy for smart, sustainable and inclusive growth"¹², which includes as one of its flagship initiatives the development of a Digital Agenda for Europe.
- (3) Creating a legal framework to facilitate the digitisation and dissemination of works for which no author is identified or, even if identified, is not located, so called orphan works, is a key action of the Digital Agenda for Europe, as set out in the

¹¹ OJ C , , p. .
¹² COM(2010) 2020.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – A Digital Agenda for Europe¹³.

- (4) The exclusive rights for authors of reproduction and of making available to the public of their works, as harmonised under Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society¹⁴, require the consent of the author prior to the digitisation and making available of a work.
- (5) In the case of orphan works, such prior consent to carry out acts of reproduction or of making available to the public cannot be obtained.
- (6) Different approaches in the Member States to the recognition of orphan work status can present obstacles to the functioning of the internal market and the use and cross-border access to orphan works. Such different approaches can also result in restrictions on the free movement of goods and services which incorporate cultural content. Therefore, ensuring the mutual recognition of such status is appropriate.
- (7) In particular, a common approach to determine the orphan status and the permitted uses of orphan works is necessary to ensure legal certainty in the internal market with respect to the use of orphan works by libraries, museums, educational establishments, archives, film heritage institutions and public service broadcasting organisations.
- (8) Cinematographic, audio and audiovisual works in the archives of public service broadcasting organisations and produced by them include orphan works. Taking into account the special position of broadcasters as producers of audio and audiovisual material and the need to adopt measures to limit the phenomena of orphan works in the future, it is appropriate to set a cut off date relating to the application of this Directive as far as the works in the archives of broadcasting organisations are concerned.
- (9) For the purposes of this Directive, cinematographic, audio and audiovisual works in the archives of public service broadcasting organisations should be understood as including works commissioned by such organisations for their exclusive exploitation.
- (10) The creation of large online libraries facilitate electronic search and discovery tools which open up new sources of discovery for researchers and academics that would otherwise have to content themselves with more traditional and analogue search methods.
- (11) For reasons of international comity, this Directive should only apply to works that are first published or broadcast in a Member State.
- (12) Before a work can be considered an orphan work, a good faith and reasonable diligent search for the author should be carried out. Member States should be permitted to provide that such a diligent search may be carried out by the organisations referred to in this Directive or by other organisations.

¹³

COM(2010) 245.

¹⁴

OJ L 167, 22.6.2001, p. 10.

- (13) It is appropriate to provide for a harmonised approach concerning such diligent search in order to ensure a high level of protection of copyright in the Union. A diligent search should involve the consultation of publicly accessible databases that supply information on the copyright status of a work. Moreover, in order to avoid duplication of costly digitisation, Member States should ensure that use of orphan works by the organisations referred to in this Directive is recorded in a publicly accessible database. To the extent possible, publicly accessible databases of search results and use of orphan works should be designed and implemented so as to permit interlinkage with each other on a pan-European level and consultation thereof through a single entry point.
- (14) Orphan works may have several authors or include other works or protected subject matter. This Directive should not affect the rights of known or identified rightholders.
- (15) In order to avoid duplication of search efforts, a diligent search should be conducted only in the Member State where the work was first published or broadcast. In order to enable other Member States to ascertain whether the orphan status of a work has been established in another Member State, Member States should ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database.
- (16) It is appropriate to provide that authors are entitled to put an end to the orphan status in case they come forward to claim their works.
- (17) In order to promote learning and culture, Member States should permit libraries, educational establishments and museums which are publicly accessible, as well as archives, film heritage institutions and public service broadcasting organisations, to make available and reproduce orphan works, provided such use fulfils their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works contained in their collections. Film heritage institutions should, for the purposes of this Directive, cover organisations designated by Member States to collect, catalogue, preserve and restore films forming part of their cultural heritage.
- (18) Contractual arrangements may play a role in fostering the digitisation of European cultural heritage, it being understood that libraries, educational establishments, museums or archives and film heritage institutions may, with a view to undertake the uses permitted under this Directive, conclude agreements with commercial partners for the digitisation and making available of orphan works. These agreements may include financial contributions by such partners.
- (19) In order to foster the Union's citizens' access to Europe's cultural heritage, it is also necessary to ensure that orphan works which have been digitised and made available to the public in one Member State are also available in other Member States. Publicly accessible libraries, educational establishments, museum, archives, film heritage institutions and public service broadcasting organisations that use an orphan work in order to achieve their public interest missions should be able to make the orphan work available to the public in other Member States.
- (20) This Directive should be without prejudice to existing arrangements in the Member States concerning the management of rights such as extended collective licences.

- (21) Member States should also be allowed to permit the use of orphan works for purposes which go beyond the public interest missions of the organisations covered by this Directive. In such circumstances, the rights and legitimate interests of rightholders should be protected.
- (22) When a Member State authorises, under the conditions established in this Directive, the use of orphan works by publicly accessible libraries, educational establishments, museums, archives, film heritage institutions or public service broadcasting organisations for purposes beyond their public interest mission, rightholders who come forward to claim their works should be remunerated. Such remuneration should take account of the type of work and the use concerned. Member States may provide that revenues collected from such use of orphan works for the purpose of remuneration but which are unclaimed after the expiry of the period fixed in accordance with this Directive should contribute to financing rights information sources that will facilitate diligent search, by low-cost and automated means, in respect of categories of works that fall actually or potentially within the scope of application of this Directive.
- (23) Since the objectives of the action to be taken, namely legal certainty with respect to the use of orphan works, cannot be sufficiently achieved by the Member States and can therefore, by reason of the uniformity of the rules governing the use of orphan works be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not exceed what is necessary to achieve those objectives.

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Subject matter and scope

1. This Directive concerns certain uses of orphan works undertaken by publicly accessible libraries, educational establishments or museums as well as by archives, film heritage institutions and public service broadcasting organizations.
2. This Directive applies to works first published or broadcast in a Member State and which are:
 - (1) Works published in the form of books, journals, newspapers, magazines or other writings, and which are contained in the collections of publicly accessible libraries, educational establishments, museums or archives, or
 - (2) Cinematographic or audiovisual works contained in the collections of film heritage institutions, or
 - (3) Cinematographic, audio or audiovisual works produced by public service broadcasting organisations before the 31 December 2002 and contained in their archives.

Article 2
Orphan works

1. A work shall be considered an orphan work if the rightholder in the work is not identified or, even if identified, is not located after a diligent search for the rightholder has been carried out and recorded in accordance with Article 3.
2. Where a work has more than one rightholder, and one of the rightholders has been identified and located, that work shall not be considered an orphan work.

Article 3
Diligent search

1. For the purposes of establishing whether a work is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out for each work, by consulting the appropriate sources for the category of works in question.
2. The sources that are appropriate for each category of works shall be determined by each Member State, in consultation with rightholders and users, and include, the sources listed in the Annex.
3. A diligent search is required to be carried out only in the Member State of first publication or broadcast.
4. Member States shall ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database.

Article 4
Mutual recognition of orphan work status

A work which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States.

Article 5
End of orphan work status

Member States shall ensure that a rightholder in a work considered to be orphan has, at any time, the possibility of putting an end to the orphan status.

Article 6
Permitted uses of orphan works

1. Member States shall ensure that the organisations referred to in Article 1(1) are permitted to use an orphan work in the following ways:
 - (a) by making the orphan work available, within the meaning of Article 3 of Directive 2001/29/EC;

- (b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitization, making available, indexing, cataloguing, preservation or restoration.
- 2. However, unless otherwise provided in Article 7, the organisations referred to in Article 1(1) may not use orphan works in order to achieve aims other than their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works contained in their collections.
- 3. This Directive is without prejudice to the freedom of contract of such organisations in the pursuit of their public interest missions.
- 4. Member States shall ensure that the organisations referred to in Article 1(1), when using orphan works in accordance with paragraph 1, maintain records of their diligent search and publicly accessible records of use.

Article 7 *Authorised uses of orphan works*

- 1. Member States may authorise the organisations referred to in Article 1(1) to use an orphan work for purposes other than those referred to in Article 6(2), provided that:
 - (1) the organisations referred to in Article 1(1) maintain records of their diligent search;
 - (2) the organisations maintain publicly accessible records of their use of orphan works;
 - (3) in the case of an orphan work where a rightholder has been identified but not located, the name of the rightholder is indicated in any use of the work;
 - (4) rightholders which put an end to the orphan status of the work, within the meaning of Article 5, are remunerated for the use that has been made of the work by the organisations referred to in Article 1(1);
 - (5) rightholders may claim their remuneration under point (4) within a period fixed by Member States and which shall not be less than five years from the date of the act giving rise to the claim.
- 2. Member States may chose the means for authorising use within the meaning of paragraph 1 and remain free to decide on the use of any revenues which are unclaimed after the expiry of the period fixed in accordance with paragraph 1(5).

Article 8 *Continued application of other legal provisions*

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, 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.

Article 9 *Application in time*

1. The provisions of this Directive shall apply in respect of all works referred to in Article 1 which are, on *[transposition date]*, protected by the Member States' legislation in the field of copyright.
2. This Directive shall apply without prejudice to any acts concluded and rights acquired before *[transposition date]*.

Article 10 *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [...] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 11 *Review clause*

The Commission shall keep under constant review the development of rights information sources and shall, at the latest one year after the entry into force of this Directive, and at annual intervals thereafter, submit a report concerning the possible inclusion in the scope of application of this Directive of works or other protected subject matter not currently included in such scope, and in particular phonograms and stand alone photographs and other images.

By *[one year after transposition date]*, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee, a report on the application of this Directive, in the light of the development of digital libraries.

When necessary, in particular to ensure the functioning of the Internal Market, the Commission shall submit proposals for the amendment of this Directive.

Article 12 *Entry into Force*

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 13

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX

The sources referred to in Article 3(2) shall be the following:

- (1) For published books:
 - (a) Legal deposit;
 - (b) Existing databases and registries, including ARROW (Accessible Registries of Rights Information and Orphan Works) and WATCH (Writers, Artists and their Copyright Holders) and the ISBN (International Standard Book Number);
 - (c) The databases of the relevant collecting societies, in particular reproduction rights organisations.
- (2) For journals and periodicals:
 - (a) The ISSN (International Standard Serial Number) for periodical publications;
 - (b) Indexes and catalogues from library holdings and collections.
- (3) For newspapers and magazines:
 - (a) The publishers association in the respective country and the authors and journalists associations;
 - (b) Legal deposit;
 - (c) The databases of relevant collecting society including Reproduction rights organisations.
- (4) For visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and others that are contained in books, journals, newspapers and magazines:
 - (a) The sources referred to in points (1), (2) and (3);
 - (b) The databases of the relevant collecting societies in particular for visual arts and including reproduction rights organisations;
 - (c) The databases of picture agencies where applicable.
- (5) For audiovisual works contained in the collections of film heritage institutions and public service broadcasting organisations:
 - (a) Legal deposit;
 - (b) Databases of film heritage institutions and national libraries;
 - (c) Databases with relevant standards and identifiers such as ISAN for audiovisual material;
 - (d) The databases of the relevant collecting societies in particular for authors, performers, phonogram producers and audiovisual producers.