European Commission: European Commission Proposes a Directive on Orphan Works

IRIS 2011-7:1/5

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On 24 May 2011, the European Commission adopted a proposal for a directive on certain permitted uses of orphan works, which is accompanied by an Impact Assessment and a summary. The objective of the 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 and used in the pursuit of the public interest mission of specific cultural institutions.

Hence, the Commission does not adopt a generic approach to deal with the problem of orphan works in the proposal, but proposes a set of measures designed for specific situations in which the problem is considered to be particularly urgent, namely, in relation to mass digitisation projects. The proposal accordingly has a limited scope. It applies only to specific works contained in the collections of publicly accessible libraries, educational establishments, museums, archives (i.e., works published in the form of books, journals, newspapers, magazines or other writings) or film heritage institutions (i.e., cinematographic or audiovisual works) or produced by public service broadcasting organisations before 31 December 2002 and contained in their archives (i.e., cinematographic, audio or audiovisual works). Furthermore, the scope of the proposal is explicitly limited to works first published or broadcast in a member state.

Pursuant to the proposal, member states must ensure that, once such works qualify as orphan works, cultural institutions are permitted to make them available to the public and to reproduce them. The works may not be used for purposes other than the public interest missions of preservation, restoration and the provision of cultural and educational access to works contained in the collections of the cultural heritage institutions. Member states may permit the use of orphan works for other purposes, but only on specific conditions. This includes the requirement of indicating, where possible, the rightsholder’s name in any use of the work and of remunerating rightsholders that come forward claiming for the usage made. Claims for remuneration must be made within a fixed period not less than five years from the date of the act giving rise to the claim. In any case, cultural institutions must maintain records of their diligent search and publicly accessible records of their use of orphan works.

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An “orphan work” is defined as a work the rightsholder of which is not identified or, if identified, has not been located after a diligent search has been carried out and recorded. A work shall not be considered to be an orphan work where it has multiple rightsholders and one of them has been identified and located. Rightsholders should be able to put an end to the orphan status of a work at any time.

The required “diligent search” is outlined in detail in the proposal and includes consultation of the appropriate sources for the category of works in question. What these are shall be determined by each member state, in consultation with rightsholders and users. They must include, as a minimum, the sources listed in the Annex to the proposal. The diligent search must be carried out in the member state of first publication or broadcast and the results of the executed search are to be recorded in a publicly accessible database in that member state.

Once a work, in accordance with these provisions, is considered an orphan work in one member state, it shall be recognized as an orphan work in the other member states. This means that a cultural institution that failed to identify or locate the rightsholder(s) of a work after a diligent search can use the work across the EU without the need to validate the orphan status of the work in each and every member state.

Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final, Brussels, 24 May 2011

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0289:FIN:EN:HTML

Commission staff working paper, “Impact Assessment on the cross-border online access to orphan works accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works”, SEC(2011) 615 final, Brussels, 24 May 2011

http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf

Commission staff working paper, Summary of the Impact Assessment on the cross-border online access to orphan works accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, SEC(2011) 616 final, Brussels, 24 May 2011

http://ec.europa.eu/internal_market/copyright/docs/orphan-works/executive-summary_en.pdf

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