Orphan works: permitted uses

2011/0136(COD) - 25/10/2012 - Final act

PURPOSE: to create a legal framework to ensure the lawful, cross-border online access to orphan works.

LEGISLATIVE ACT: Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works.

CONTENT: following agreement at first reading, the European Parliament and Council adopted the Directive establishing a legal framework aimed at improving access to and digitisation of orphan works across the EU. Orphan works are works (such as books, newspapers, magazines, audio recordings, films, etc.) that are protected by copyright but whose owners cannot be identified or found.

The Directive facilitates the digitisation of and lawful cross-border online access to orphan works contained in the collections of libraries, educational establishments, museums, archives, audiovisual heritage institutions and public service broadcasting organisations. These beneficiary institutions will be able to use orphan works when fulfilling their public interest missions without the risk of infringing copyright. It is a major step for the creation and development of digital libraries, such as Europeana, which contribute to the preservation and dissemination of European cultural heritage.

The Directive will apply to works that are first published or broadcast in the territory of an EU Member State. A diligent search for right holders will be carried out in that Member State prior to granting the orphan work status. Material catalogued as having orphan status in a Member State will have the same status in all Member States. A single publicly accessible online database will contain the information related to orphan works, including the results of searches for right holders.

The Directive provides for a system of compensation in the event of reappearing right holders.

The main points of the Directive are as follows:

Copyright as the basis of innovation: as suggested by Parliament, the Directive 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 Europes 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;
- it 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 h, 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: Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Directive 2001/29/EC to ensure that the organisations referred to above are permitted to use orphan works contained in their collections in the following ways:

- by making the orphan work available to the public;
- by acts of reproduction, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

The organisations may use an orphan work only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. They 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.

ENTRY INTO FORCE: 28/10/2012

TRANSPOSITION: by 29/10/ 2014.

APPLICATION: the Directive shall apply in respect of all works and phonograms which are protected by Member States' legislation in the field of copyright on or after 29/10/ 2014, and shall apply without prejudice to any acts concluded and rights acquired before that date.