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Subject: Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works
- Presidency note on selected issues

Delegations will find attached a Note prepared by the Presidency as the basic for discussion at the Working Party on Intellectual Property (Copyright) on 10 - 11 November 2011.

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Following the discussion at the meetings of the Copyright Working Party held between June and October 2011, based on the Commission's initial proposal for a Directive on certain permitted uses of orphan works, as well as on the Presidency's compromise proposals, the Presidency considers that before another revised version of the text is presented, it is necessary to hold an additional exchange of views on some of the issues, where divergent opinions have been expressed by the Member States. The discussion on the entire text of the Directive will be resumed at the future meetings.

1. Unpublished works

Some delegations asked for the inclusion of unpublished works into the scope of the Directive. Other delegations had doubts whether this would be the right way forward.

The following proposal intends to reconcile these different views. It provides for the possibility to extend the scope of the Directive to unpublished orphan works which are part of the collections of the libraries, museums, educational institutions, archives, audio/film heritage institutions and public service broadcasters without putting an obligation on Member States that oppose such an approach. It also requires from Member States making use of such possibility to limit its application to works for which it is reasonable to consider that they are the "country of origin".

If the author of the unpublished orphan work can be identified, the country of origin is determined by the nationality or the habitual residence of the rightholder. If the author cannot be identified, the country where it is reasonable to presume that the work was created is deemed to be the country of origin.

Furthermore, Member States would not be allowed to extend the scope of the Directive to an unpublished work if there are any indications that the rightholder would oppose (or would have opposed) the uses referred to in Article 6 (the non publication of the work may be, for instance, part of the conditions imposed by a person or his heirs when depositing a work with a library or there may be recorded statements by the author in that respect). In that context, it should also be noted that laws on privacy and data protection would remain applicable (which is already stated in Article 8).

The provision could read as follows:

Article 1(4) (new)

Member States may extend the scope of this Directive to works referred to in Article 1(2) that have never been published or broadcast and which are contained in the collections of the organisations referred to in Article 1(1) provided that:

- (i) the rightholders of the work are nationals or residents of the Member State where the organisation is located or, in case neither the nationality nor the habitual residence of a rightholder can be established, it is reasonable to presume that the work was created there; and*
- (ii) it is reasonable to presume that the rightholders would not oppose the uses referred to in Article 6.*

Additional safeguards can be considered to address concerns voiced in the Council Working Group. The additional “public interest” condition, apart from those already envisaged in Article 6, could be introduced. It could take form of extending the Directive only to unpublished works created before a certain date, which represent a historical and cultural value for the Member State in question. Furthermore, the Directive could allow only for an online use of these unpublished works, which are already lawfully available to the public in the premises of the beneficiary institutions for on-the-spot reference use.

2. Legal mechanisms for the use of orphan works

In order to meet the Member States' concerns about the legal character of the "permitted use" of orphan works, initially proposed by the Commission, which should allow the beneficiary institutions to achieve aims related to their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works contained in their collections for the use of orphan works, the Presidency suggested the mechanism based on the exception to the reproduction and the making available rights provided for in Article 2 and 3 of Directive 2001/29/EC.

Although some Member States welcomed this approach, a number of delegations have questioned the lack of possibility to choose other legal mechanisms for the use of works identified as orphans, which are part of collections of the beneficiary institutions.

While the Presidency acknowledges, as some delegations have been highlighting, that the issue of orphan works is a specific problem within the wider debate on finding solutions for mass digitization projects, including the issue of licensing schemes and their transborder effects, it must be emphasized that the aim of the presently discussed Commission's proposal is solely to tackle the problem of orphan works.

Responding, however, to the call for more flexibility as regards different legal solutions in the Member States, either existing or to be introduced in the future, allowing to use orphan works contained in the collections of certain institutions, the Presidency would like to put the following option under the Member States' consideration. This working proposal could – if this approach is accepted by the Member States – be further elaborated as a replacement to the respective paragraphs of Article 6 in the current Presidency's text.

As this proposal would be related to the use of orphan works only, it would be without prejudice to arrangements in the Member States concerning the management of rights such as extended collective licences (recital 20¹).

¹ The exact wording and placement of recital 20 is to be further elaborated at a later stage.

- a) Taking into account different systems to authorise the use of orphan works, identified as such after a diligent search for the rightholder has been conducted, a more general provisions of Article 6 (1)-(2) could be considered along the following lines:
1. *Member States shall ensure that the organisations referred to in Article 1(1) are authorised or otherwise permitted to use orphan works contained in their collections 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.*
 - 1a. *Member States may chose the means for authorising or permitting the use of orphan works within the meaning of paragraph 1, including by the provision of an exception or limitation to the reproduction and the making available rights provided for in Articles 2 and 3 of Directive 2001/29/EC respectively.*
 2. *The organisations referred to in Article 1(1) may use an orphan work in accordance with paragraph 1 only in order to achieve aims related to their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works contained in their collections. When providing of the exception or limitation referred to in paragraph 1a, Member States shall ensure that the reproducing and making available of orphan works does not conflict with the normal exploitation of the work or other subject matter and does not unreasonably prejudice the legitimate interests of the rightholders.*
- b) Under the above approach, the arrangements for the payment of a remuneration for the authorisation or license could be left to the Member States' discretion, however the Directive could require that a remuneration is due to rightholders that put an end to the orphan status of their works, including in the case of uses under the exception, since a number of Member States expressed their concerns about the non-mandatory character of this remuneration, as proposed by the Presidency. In this case Article 6(5) could read as follows:

5. *[Without prejudice to national arrangements regarding the remuneration for authorising the use of works in accordance with paragraphs 1-1b,] Member States shall provide that a remuneration is due to rightholders that put an end to the orphan status of their works for the use that has been made of such works in accordance with paragraphs 1-2.*

Member States are welcomed to express their views on the above working suggestions at the Copyright Working Party meeting on 10-11 November 2011 or in writing until 18 November 2011.
