

CENL Statement on the European Commission Proposal for a Draft Directive on Orphan Works and the need for Streamlined Rights Clearance Mechanisms (KOM (2011) 289)

The Conference of European National Librarians (CENL), which represents the directors of the national libraries of Europe, believes the Commission's draft directive on orphan works¹ is a much welcomed first step to facilitate the digitisation of the national collections of the European Union.

CENL however believes that the proposal in its current form falls short of the digital norms of the information society, and impacts upon the ability of cultural institutions – museums, archives, audiovisual institutions and libraries – to make their collections available digitally for the benefit of education, the economy and society. In turn it risks distorting European society's view of its own 20th century culture as only digitisation of certain cultural works and not others is envisaged.

In particular the CENL would like to raise the following issues for further consideration by the Commission, Parliament and the Council:

1. The exclusion of unpublished works, artistic works and sound recordings.

Such items represent historically important and unique collection items such as manuscripts, letters, photographs, amateur films and amateur music recordings, oral histories, paintings, drawings and 20th century European audio culture. It is unclear why these categories of works, already available to the public from libraries, archives, museums and galleries are not in the scope of the proposed directive. Their exclusion will unjustifiably lead to a misrepresentation of European collections in the online space – favouring traditionally published text and film to the exclusion of much other culturally unique material.

2. Exclusion of orphan works with more than one rightholder, where one of the rightholders has been identified.

Article 2 (2) excludes a work from being considered as an orphan work when one of the rightholders has been identified and located. There are many works (books, periodicals, film etc.) with multiple rightholders. CENL therefore suggests that in case one right holder is identified, the works of the remaining rightholders should fall back into the status of orphan work and be considered by the Directive.

¹ In-copyright works whose owners cannot be identified or located

- 3. Not facilitating of mass digitisation.** As the current draft stands the proposal may facilitate the digitisation of individual items but does not enable mass digitisation. Given the success of the ARROW database we strongly believe that any search for rightsholders should be modelled on ARROW – namely that diligent search in the context of mass digitisation equates to the automated matching of catalogue or finding aids databases with the appropriate rightsholder database(s). Without this common sense approach, the mass digitisation of large 20th century collections is effectively impossible.
- 4. Extending the bounds of copyright.** Article 6.1(b) deals with the permitted uses of orphan works and undesirably seeks to extend the ambit of copyright beyond its current boundaries. The core information sharing activities of cataloguing and indexing are not subject to the exclusive rights created by copyright law and therefore have no place in the *copyright acquis*. If the references to cataloguing and indexing are not deleted we risk the free flow of knowledge being further compromised in the online world. In addition, in order to future-proof the orphan works directive it is important that Art. 6.1(b) is not, as the draft currently stands, an exhaustive list of activities².
- 5. The role of audio, audiovisual and cinematographic collections.** Audio, audiovisual and cinematographic collections comprise important parts of many European collections. It is important that the provisions in the draft directive regarding audio, audiovisual and cinematographic works in film heritage institutions or produced by public service broadcasting organisations before 31 December 2002 and contained in their archives also cover the audio, audiovisual and cinematographic collections in libraries, archives, museums and other cultural institutions as well. CENL also regrets that film related materials such as photographs, posters, text documents, drawings etc. are not considered in the Directive.
- 6. Freedom of action within the copyright acquis.** The proposal should not seek to unnecessarily affect the freedom and legislative norms of member states. CENL believes that the proposed recital 20 regarding Extended Collective Licensing should mirror the exact wording of recital 18 in the Copyright Directive 2001/29/EC.
- 7. Representivity of European collections.** Article 3.3 limits the use of orphan works only to those first published or broadcast in a European member state. For cinematographic works the use of “country of origin” would be more appropriate. Whilst the intention of this clause is to ensure

² CENL also questions whether the inclusion of the word “digitisation” is indeed appropriate as strictly speaking it is a means of reproduction as opposed to a purpose in itself.

international comity the limitations and exceptions in the Copyright Directive itself do not contain any such restriction. Therefore, its inclusion in this proposal and the precedent it sets, should be reconsidered carefully.

In its current form the proposal also does not address the works which, whilst clearly European in origin and held within national European collections, are published globally by multinational publishers from member states. Also it does not address works where the origin is not known. The definition within the orphan works directive should ensure that such works are not excluded.

- 8. Appropriate acknowledgements.** Article 7 Par. 1 (3) stipulates that where rightsholders have been identified but not located, the name of the rightsholder should be indicated in any use of the work. As stewards of our culture, the historical accuracy of our collections is paramount, and we wholeheartedly support this principle. However it needs to be balanced with practicality and reasonableness in relation to audio and audiovisual material as they can sometimes have scores of contributors making full and accurate attribution in metadata extremely complex.
- 9. Fair compensation.** Article 7 Par. 4 and 5 does not provide any limit on the level of remuneration or fair compensation for rightsholders who come forward and whose work has been used. Nor is it entirely clear whether a reappearing rightsholder can claim remuneration only for future use, or also for uses that have already taken place in line with the law. Without any reasonable limitations on remuneration, cultural institutions and the public purse will remain exposed to unquantifiable levels of financial risk which acts as a disincentive to mass digitisation itself.

An Orphan Works Directive is a good start, but is only half the story. In order to support Europeana, and avoid an online black hole of the 20th century, we need further legislation to facilitate in-copyright works of known rightsholders in our collections being digitised, and then made available across borders. This requires streamlined rights clearance mechanisms such as those that already exist in a number of Nordic countries³.

CENL therefore calls upon the European Commission, Parliament and the Council to engage in policy and copyright norm setting in the area of Orphan Works as well as Out-of-Commerce works to facilitate mass digitisation and provide for its cross-border availability online to all European citizens.

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³ The Scandinavian system is known as “Extended Collective Licensing” as for certain specific public interest purposes (such as broadcasting, mass digitisation, education etc) the law allows Collective Management Organisations to extend their remit to rightsholders who are not members of their organisation.