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From: Presidency
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No. Cion prop.: 10832/11 PI 61 AUDIO 18 CULT 37 CODEC 926

Subject: Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works
- Information from the Presidency on the progress made

I. INTRODUCTION

1. The Commission proposal regarding the above-mentioned Directive was submitted on 26 May 2011 (10832/11). Its main objective is to create a legal framework to ensure the digitisation and lawful, cross-border online access to orphan works contained in the libraries or archives of certain public or publicly accessible institutions (when orphan works are used in the pursuance of the public interest mission of these institutions).

2. The aim of this document is to inform the Competitiveness Council of the progress which has been achieved to date and the state of play on this topic.
3. The Commission's presentation of the proposal and the initial exchange of views took place in June during the Hungarian Presidency. During the Polish Presidency, the Working Party on Intellectual Property (Copyright) met on six occasions to examine the Commission proposal and the various subsequent Presidency documents, including two compromise proposals, the last one contained in document 15756/11. One more meeting is envisaged in December before the file is handed over to the Danish Presidency.
4. Among the issues discussed in the Working Party, the following can be considered as of major importance.

II. OUTSTANDING ISSUES

A. SUBJECT MATTER AND SCOPE OF THE DIRECTIVE

4. According to Article 1(2) of the Commission's initial proposal, the possible use of orphan works was limited per category of work and beneficiary (e.g. "orphan books" could only be used by libraries, educational establishments, etc. but not by film heritage institutions). The Presidency proposed not to limit particular subject matters to particular institutions, the relevant point being that the work in question must be contained in the collection of the beneficiary institution. There seems to be a majority of Member States in favour of this approach.

5. While the catalogue of institutions and subject matter covered by the Directive is still under discussion in the Working Party, the Presidency proposed to add the category of “audio heritage institutions” to the list of beneficiaries (apart from publicly accessible libraries, educational establishments and museums, as well as archives, film heritage institutions and public service broadcasters, included in the Commission's initial proposal) and the category of “audio recordings” to the list of subject matter (apart from works published in the form of books, journals, newspapers, magazines and other writings, as well as cinematographic and audio/audiovisual works, as initially proposed by the Commission). Some Member States, however, maintain their reservations on the scope of the Directive.

6. The Working Party also examined the possibility of including unpublished works in the scope of the Directive. While a considerable number of Member States recognise the importance of addressing the issue, the view is that more discussion is needed. Therefore, at this stage, no specific suggestions have been included in either of the Presidency compromise proposals.

7. The Presidency also clarified that works and other protected subject-matter that are embedded or incorporated in the works referred to in Article 1(2) should be understood as falling within the scope of the Directive (Article 1(3)).

8. Furthermore, the Presidency proposed to extend the scope of the Directive to cover situations of "partial orphan works" or "orphan rights" by allowing the beneficiaries, in cases of works where there is more than one rightholder and some are known and some unknown, to use the work once the rights of known rightholders have been cleared. A very large number of Member States believe that these situations should be covered by the Directive, although the legal impact of this extension is still being examined by the Working Party.

B. DILIGENT SEARCH

9. Some Member States have been asking to have more details on how and where the diligent search for the rightholders needs to be carried out and recorded.
10. The Presidency provided for some clarifications in its compromise proposals regarding the character of the search (by introducing in Article 3(1) the principles of "good faith" and "reasonability") and the criteria for determining the Member State of first publication or broadcast (Article 1(1)), where the search should be carried out. It was also indicated in Article 3(3) that the additional consultations of information available in other countries may be necessary.

Furthermore, the Presidency has worked to bring more clarity to the obligations related to maintaining records of diligent searches and subsequent uses of orphan works by the beneficiary organizations and to ensure the exchange of information between databases of different beneficiaries (Article 6(4)). Member States consider that these issues are key in terms of the practical implementation of the proposal and are therefore an important part of the negotiations.

11. The discussion on these issues will be continued in the Working Party.

C. MUTUAL RECOGNITION AND END OF ORPHAN WORKS STATUS

12. Member States have been asking for some clarifications on the practical consequences of the mutual recognition of the orphan work status. While a clarification was made in Article 4, this issue should be analysed further in the future discussions in the Working Party.
13. As regards the end of the orphan work status in Article 5, no formalities were imposed on the rightholders, as it might be considered as being inconsistent with the Berne Convention.

D. PERMITTED/AUTHORISED USES OF ORPHAN WORKS

14. In response to the Member States' doubts regarding the nature of the mechanism proposed by the Commission to allow for the use of orphan works (after a diligent search) legal character of "permitted uses" of orphan works, the Presidency proposed a solution based on an exception or limitation to the reproduction and the making available rights provided for in Article 2 and 3 of Directive 2001/29/EC, which should therefore be subject to the three step test.
15. Some Member States, however, would like to continue discussing the issue of mechanisms for uses of orphan works.
16. Given that a number of questions and concerns were raised with respect to the possible commercial use of orphan works foreseen as an option for Member States in the Commission's original proposal in Article 7, the Presidency proposal now limits the possibilities to use "orphan works" to those cases where such works are used for the public policy objective of the beneficiaries. A significant number of Member States seem to support this approach.

E. RELATIONSHIP OF THE ORPHAN WORKS PROPOSAL WITH NATIONAL SOLUTIONS FOR MASS DIGITIZATION

17. In the Working Party discussions, a number of delegations have questioned the relationship between the orphan works solution proposed by the Commission and different national arrangements already in place or being developed to allow the mass digitization of certain categories of works whether they are potentially orphans or not (for instance out-of-commerce books) on the basis of licenses negotiated between the users and collecting societies (sometimes backed by an extended effect of the license or by other legal mechanisms). Member States have also highlighted that the issue of orphan works is a specific problem within the wider debate on finding solutions for mass digitization projects.

18. The Commission has indicated that these are two separate issues addressing different needs. The orphan works proposal is intended to provide the necessary mechanism for libraries and other cultural institutions to determine the orphan status of individual works after a reasonable and good faith diligent search and be able to use them without the risk of infringing copyright. The national arrangements which a few Member States are putting in place for issues such as out-of-commerce books go beyond the issue of orphan works and provide licensing mechanisms with the objective of allowing the use of large numbers of works (without having to determine whether within a collection of, for instance, out-of-commerce works there are some that may, or may not, be orphans). The Commission has highlighted that the purpose of the proposed Directive is to find a solution to the specific issue of orphan works (i.e., the determination of what an orphan work is and the uses that can be made of it) and that other questions arising in the context of mass digitization should be addressed separately; the Commission has referred, for instance, to the recently signed Memorandum of Understanding on out-of-commerce books and journals.

19. While the Presidency considers that the purpose of the draft Directive should remain limited to providing a solution for the determination of what an orphan work is and its permitted uses, thereby providing the beneficiaries with legal certainty when using orphan works, it has been emphasized by several delegations that it should be without prejudice to national licensing solutions to address mass digitization of works, both existing and introduced in the future (recital 20).

III. CONCLUSION

The Council is invited to take note of the present progress report.
