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Proposal for a Directive on certain permitted uses of orphan works (COM 2011/0136(COD))

GESAC's POSITION PAPER

GENERAL COMMENTS

GESAC welcomes the intention of the Commission to create legal framework conditions for the digital use of orphan works within the Internal Market. GESAC understands and agrees with the objective to preserve Europe's cultural heritage while making it available to the public throughout the EU.

However, the proposed Directive fails to strike a fair balance between the interests of the general public in accessing orphan works and the authors' interest in participating in the economic advantages deriving from the exploitation of their works.

The fundamental principle of Intellectual Property protection which requires the prior authorisation of rights holders for the use of their works should be incorporated in the Directive.

Without prejudging the solutions which will be introduced by the Member States (orphan specific licence granted by collective management societies, orphan specific licence granted by a public body, extended collective licensing, compulsory collective management, *etc.*), GESAC recommends introducing a requirement for Member States to provide for licensing systems for the use of orphan works. The Directive should also provide for a remuneration for all uses of orphan works not covered by free-of-charge exceptions within the meaning of Article 5 of Directive 2001/29/EC.

ARTICLE 1 – SUBJECT MATTER AND SCOPE

GESAC supports a clear sector by sector approach as the scope of the problems raised by orphan works and the solutions that are required are different depending on the cultural sector considered (printed works', audiovisual, musical works' sectors, *etc.*). The scope of the proposal should be clarified, in particular, concerning the situation of musical works.

In the music sector, collective management is the rule, and internationally-available information on works and rightholders is both complete and accurate, so that there are very few orphan musical works. This singular feature means that the proposed Directive's arrangements are *prima facie* not relevant to it.

However, there is uncertainty about the treatment of musical works incorporated in the cinematographic or audiovisual works contained in the collections of film heritage institutions or in the cinematographic, audio or audiovisual works produced by public service broadcasting organisations before 31 December 2002 and contained in their archives (Article 1. 2 (2) and (3)).

The Commission seems clearly minded to exclude these works from the scope of the Directive, as can be inferred from its explanations on Article 1, where it specifies that the proposal for a Directive concerns written works, including visual works such as photographs and illustrations embedded in them. This suggests that musical works embedded in cinematographic, audio or audiovisual works, fall outside the Directive.

However, for greater legal clarity, musical works, including embedded musical works, should be explicitly excluded from the scope of the Directive.

ARTICLE 2 –ORPHAN WORKS

Definition of an orphan work

Within the proposal for a Directive, an orphan work is defined in reference to “*the rightholder*” in that work, disregarding the fact that there may be (and usually are) multiple authors or rightholders with rights in the same work. This reality must be reflected in Article 2.1 which needs to be slightly amended and, more generally, in the Directive as a whole.

Partially orphan works

According to Article 2.2, if a work has more than one rightholder and if one of the rightholders has been identified and located, this work is no longer to be regarded as an orphan work.

Stipulating that the absence of certain rightholders must not have any effect on the other rights attached to the work and whose holders are identified and contactable is perfectly justified. However, in its present wording the provision does not resolve most of the blockages, which concern not so much “fully” orphan works, but works of which only one or more rightholders have been identified or located.

GESAC's recommendation for the introduction of licensing systems for the use of orphan works is intended to solve this problem (see Article 6).

The appointed organisations could grant licenses for the orphan part of the work, while the rights held by identified and located rightholders would be subject to traditional licensing by the rightholders normally entitled to do so.

Role of collective management societies

According to Article 2.2, in the case where the rightholder has been identified but not located, the work is granted an orphan status. This is not justified in the case where the management of the rights has been entrusted to a collective management society.

GESAC suggests underlining in a Recital that the works included in the repertoire of a collective management society will not be considered as orphan works even if their rightholder(s) cannot be located.

ARTICLE 3 - DILIGENT SEARCHES

GESAC considers the diligent search described in Article 3 to be inappropriate for protecting the interests of the authors. The key point of criticism is that the diligent search and the assessment of the orphan status of a work are up to the organisation that has an interest in the free use of such work. There is therefore reason to fear that the diligent search will be regarded as a pure formality and that ultimately the decision about the use of the work will be taken by weighing up whether any legal claim can be expected should the work be made available. The proposal has a great potential for misuse.

GESAC considers that the only way to secure both legal certainty for users and rightholders is for Article 6 to include a requirement for Member States to introduce a licensing system for the use of orphan works and to appoint entities authorized to certify that a diligent search has been properly carried out.

Also, some elements of Article 3 should be amended:

Diligent search criteria

The possible ways of procuring information can vary according to the type of work and usage involved and account also has to be taken of changes in techniques and search methods. The criteria needed for a conscientious search should therefore, as indicated in Article 3.2, be determined with the relevant interest groups concerned. However, the term "*in consultation with rightholders and users*" may be a little on the weak side and GESAC proposes to replace it by "*in agreement with ...*"

Search in the country of first publication or broadcast

Article 3.3 requires a search only in the Member State “*of first publication or broadcast*”. It is far from obvious that a search in a single Member State will be enough in every case or that the State of first publication or broadcast is the State in which the rightholders will be most easily identified. GESAC proposes to add the requirement of searches in the country having the most obvious links with the work, in agreement with what was established by rightholders of the same category of works or their representatives.

Role of databases

Article 3.4 simply provides that “*Member States shall ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database*”.

Practical measures for cross-checking between pan-European databases would be welcome, particularly in light of Article 4 on mutual recognition of orphan work status at European level.

GESAC proposes to specify in this article that the databases must be publicly accessible from all EU Member States and to underline in a Recital the need to identify, in coordination with the parties concerned, the practical measures to be applied to facilitate searches in the different Member States.

Some projects are played up, like the ARROW (Accessible Registries of Rights Information and Orphan Works) project set up in September 2008, to enable any user to find information on rightholders or check whether a work is available, out-of-print, or orphan via an interface developed at European level. Initially for textual works only the project, renamed ARROW Plus, could be expanded to other types of works, such as multimedia works.

Liability for diligent search

Recital 12 states that Member States may permit the diligent search to be carried out by organisations other than the organisations mentioned in the proposal. But in this case, the question is to know who will be liable if the diligent search is not done properly.

GESAC proposes to specify in a Recital that the organisations referred to in Article 1.1 will remain liable even for searches performed by others.

ARTICLE 5 – END OF ORPHAN WORK STATUS

GESAC considers it is necessary to specify in a Recital that the end of the orphan work status opens the way to all remunerations normally due for the exploitation of a work, including past uses, and that it is for Member States to decide whether or not a time limit should be set within which rightholders may recover royalties.

ARTICLE 6 – PERMITTED USES OF ORPHAN WORKS

Licensing mechanisms

The aim of Article 6 is very broadly defined. It creates what looks like a very extensive exception to copyright for the use of orphan works without compensation. For authors who put an end to the orphan works status, even though their work has been put online and notwithstanding the fact that after being made available on the Internet, the work is subject to uncontrolled further reproduction and distribution. When this takes place, the use of the work to the specific purposes set forth in Article 6.2 is no longer feasible. In the end the author is largely deprived of the possibility of further commercial use of the work.

This doesn't comply with Directive 2001/29/EC, which lays down an exhaustive list of exceptions and limitations to the right of making available to the public, and does not fulfil the requirements of the Three-Step Test (Art. 5 paragraph 5 of Directive 2001/29/EC). This kind of expropriation may also be incompatible with some Member States' Constitution or legislation.

It is therefore proposed that a requirement be included for Member States to introduce licensing systems for authorising the organisations referred to in Article 1.1 to use orphan works in order to achieve their public interest missions. Member States should also appoint institutions that can certify that diligent searches have been properly carried out, grant appropriate licenses and collect and manage the remuneration owed.

Remuneration

Royalty free use of orphan works is not justified. The organisations referred to in Article 1.1 of the proposal should only profit from the orphan work status to the extent necessary for preserving the interest of the general public in accessing cultural assets. There is no need to additionally privilege the use of orphan works by providing that this use will be without remuneration. Remuneration should therefore be paid to an organisation appointed by the Member States for all uses of orphan works.

The amount of remuneration for orphan works should be in line with that of similar works. Any differentiation could result in either fraudulent "orphanisation" or "unfair competition" by orphan works to the detriment of other works. This risk is heightened for certain types of works like individual images (photographs, *etc.*) for which the orphan works registry will soon have all the hallmarks of a giant database from which users will feel they have the right to draw images that will soon be universally considered as "non-copyright".

Where the author can subsequently be identified, the deposited amount would then be distributed accordingly. Otherwise, after a period of protection determined by the Member States, the amount deposited could be used for the benefit of all authors.

Use of unclaimed revenues

Member States should remain free to decide on the use of any revenues which are unclaimed. GESAC suggests to introduce in a recital indications on the use of the revenues which are unclaimed.

Contracts with external bodies

According to Article 6.3, within the context of pursuance of their public interest mission, the organisations mentioned in the Directive may sign contracts with external bodies.

Furthermore, Recital 18 states that contracts with commercial partners may concern the digitalization and making available of orphan works and that these agreements may include financial contributions by such partners. Operators like Google or Yahoo could therefore conceivably purchase the right to digitize and distribute these works for cultural and educational purposes – in other words, free of charge – for a non-monetary consideration such as advertising for example.

This therefore makes it essential to specify in Recital 18 that commercial partners who contribute to the digitisation and making available of orphan works will not thereby acquire any rights in the works nor be entitled to use them.

Moral rights

Article 6 should specify that the uses of orphan works are made with full respect for the moral rights of the rightholders.

Heading of Article 6

Finally, GESAC proposes that the heading of Article 6 be amended to reflect the fact that uses are not "*permitted*" after a diligent search, but must be authorised.

ARTICLE 7

In the proposed Directive, Article 7 states that Member States may authorize the organisations concerned by the Directive to use works for reasons other than those listed in Article 6 – *i.e.*, clearly, for commercial purposes.

GESAC considers that the specific regime put in place by the proposal for a Directive should not apply to the use of orphan works for commercial purposes.

The point is that the aim of the Commission's proposal is to facilitate the digitisation and circulation of orphan works, in particular through digital libraries, not to promote their commercial use. The provision carried out by Article 7 on the contrary would facilitate the commercial exploitation of orphan works, even though it is limited to one category of users.

This would likely create a distortion in the functioning of the market for digitised contents. The public mission service of the organisations included in the scope of the Directive doesn't justify the competition advantage that Article 7 confers to them over other potential users.

Consequently GESAC proposes to delete this article.

ARTICLE 7 NEW - LIMITING THE PHENOMENON OF ORPHAN WORKS

Regrettably, the proposal makes no provision for ways of limiting the phenomenon of orphan works. GESAC suggests adding a new Article 7 on the implementation and promotion of preventive measures.

The appearance of new orphan works can be prevented by various means and in particular by the following:

- Effective identification of works through the promotion of technical measures that will enable works to be identified in the future, particularly works in digital format, by incorporation of metadata,
- Exchanges of information on orphan works,
- Promotion of collective management which largely precludes works becoming orphaned,
- Extended collective licensing. In this respect, attention should be drawn to the ambiguity of Recital 20, which could lead one to believe that Member States can no longer introduce extended collective licensing systems, and a clarification is proposed.
