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Subject:	Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works - Revised Presidency compromise proposal

Delegations will find in Annex, a revised compromise proposal, prepared by the Presidency for discussion at the Working Party on Intellectual Property (Copyright) on 17 February 2012.

Changes compared to the previous text (5102/12) are marked.

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Revised presidency compromise proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on certain permitted uses of orphan works

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular
Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Libraries, museums, archives, educational establishments, film or audio heritage institutions and public service broadcasting organisations are engaged in large-scale digitisation of their collections or archives in order to create European Digital Libraries. Libraries, museums, archives, educational establishments, film or audio heritage institutions and public service broadcasting organisations in the Member States contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. Technologies for mass scale digitisation of print materials and for search and indexing enhance the research value of the libraries' collections.

¹ OJ C , , p. .

- (2) The need to promote free movement of knowledge and innovation in the internal market is an important component of the Europe 2020 Strategy, as set out in the Communication from the Commission "Europe 2020: A strategy for smart, sustainable and inclusive growth"², which includes as one of its flagship initiatives the development of a Digital Agenda for Europe.
- (3) Creating a legal framework to facilitate the digitisation and dissemination of works and other protected subject matter for which no rightholder is identified or, even if identified, is not located, so called orphan works, is a key action of the Digital Agenda for Europe, as set out in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – A Digital Agenda for Europe. This action targets the concrete problem of the legal determination of the orphan works status and its consequences in terms of the permitted users and uses of the work or phonogram that has been considered to be orphan. [...]
- (3a) This Directive is without prejudice to specific solutions being developed in the Member States to address larger mass scale digitisation issues, such as in the case of so called "out of commerce works". Such solutions take into account the specificities of different types of content and different users and build upon the consensus of the relevant stakeholders. This approach has also been followed in the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on September 20, 2011 by representatives of European libraries, authors, publishers and collecting societies and witnessed by the European Commission. This Directive is without prejudice to that Memorandum of Understanding which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, rightholders and collective rights management organisations to licence the use of out-of-commerce works on the basis of the principles contained in the Memorandum of Understanding benefit from the required legal certainty in a national and in a cross-border context.

² COM(2010) 2020.

- (4) The exclusive rights of reproduction and of making available to the public of works and other protected subject matter, as harmonised under Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society³, require the consent of rightholders prior to the digitisation and making available of a work and other protected subject matter.
- (5) In the case of orphan works, such prior consent to carry out acts of reproduction or of making available to the public cannot be obtained.
- (6) Different approaches in the Member States to the recognition of orphan work status can present obstacles to the functioning of the internal market and the use of and cross-border access to orphan works. Such different approaches can also result in restrictions on the free movement of goods and services which incorporate cultural content. Therefore, ensuring the mutual recognition of such status is appropriate, since it would allow access to the orphan works in all Member States.
- (7) In particular, a common approach to determine the orphan status and the permitted uses of orphan works is necessary to ensure legal certainty in the internal market with respect to the use of orphan works by libraries, museums, educational establishments, archives, film or audio heritage institutions and public service broadcasting organisations.
- (8) Cinematographic or audiovisual works and phonograms in the archives of public service broadcasting organisations and produced by them include orphan works. Taking into account the special position of broadcasters as producers of phonograms and audiovisual material and the need to adopt measures to limit the phenomena of orphan works in the future, it is appropriate to set a cut off date relating to the application of this Directive as far as the works and phonograms in the archives of broadcasting organisations are concerned.

³ OJ L 167, 22.6.2001, p. 10.

- (9) For the purposes of this Directive, cinematographic and audiovisual works and phonograms in the archives of public service broadcasting organisations should be understood as including works and phonograms commissioned by such organisations for their exclusive exploitation.
- (10) The creation of large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for researchers and academics that would otherwise have to content themselves with more traditional and analogue search methods.
- (11) For reasons of international comity, this Directive should only apply to works and phonograms that are first published, in a Member State or, in the absence of publication, first broadcast in a Member State or, in the absence of publication or broadcast, made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders. With regard to works and phonograms, which have neither been published nor broadcast but which have been made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders this Directive should only apply provided that it is reasonable to assume that the rightholders would not oppose the use allowed by this Directive.[...]
- (12) Before a work or phonogram can be considered an orphan work, a good faith and reasonable diligent search for the holders of rights in the work or phonogram, including holders of rights in works and other protected subject matter that are embedded or incorporated in the work or phonogram, should be carried out. [...]. Member States should be permitted to provide that such a diligent search may be carried out by the organisations referred to in this Directive or by other organisations.

- (13) It is appropriate to provide for a harmonised approach concerning such diligent search in order to ensure a high level of protection of copyright and related rights in the Union. A diligent search should involve the consultation of [...] databases that supply information on the [...] works and other protected subject matter. In order to avoid duplication of search efforts, a diligent search should be carried out in the Member State where the work or phonogram was first published or, in the case where no publication has taken place, was first broadcast. With regard to works and phonograms, which have neither been published nor broadcast but which have been made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders the diligent search should be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is located. Diligent searches for rightholders of works and other protected subject matter that are embedded or incorporated in a work or phonogram should be initiated in the Member State where the diligent search for the work or phonogram, which contains the embedded or incorporated work or other protected subject matter, is carried out. A good faith and reasonable diligent search may in some cases lead to [...] additional consultation of information available in other countries. Diligent searches may generate different information such as a search record and the result of the search. The search record should be kept on file in order for the organisations to be able to substantiate that the search was diligent. Moreover, in order to ensure transparency towards rightholders and to avoid duplication of costly digitisation, Member States should ensure that the results of all diligent searches carried out in their territory, the use of orphan works by the organisations referred to in this Directive on the basis of those diligent searches and any change of the orphan status of the works or phonograms are recorded in a single online publicly accessible database at national level in the Member State in which the diligent search has been carried out. To the extent possible, these publicly accessible databases [...] should be designed and implemented so as to permit interlinkage with each other on a pan-European level and consultation thereof through a single entry point.

- (14) Orphan works may have several rightholders or include other works or protected subject matter. This Directive should not affect the rights of [...] identified and located rightholders. The beneficiaries of this Directive should only be permitted to use a work or phonogram in which one or more of the rightholders are not identified or not located, if they are authorised to do so [...] by those rightholders which have been identified and located, including rightholders of works and other protected subject matter that are embedded or incorporated in the works or phonograms. Correspondingly, when previously non identified or non located rightholders come forward in order to put an end to the orphan status and claim their rights in the orphan work, the use of the orphan work by the beneficiaries can only continue if these rightholders authorise them to do so.
- (15) *Merged with recital 13.*
- (16) It is appropriate to provide that rightholders are entitled to put an end to the orphan status in case they come forward to claim their rights in the work or other protected subject matter. Member States shall ensure that where a work or other protected subject matter has been wrongly considered to be orphan due to a negligent search and has been used, the remedies in their legislation for copyright infringement – in accordance with applicable provisions of national and EU law – remain available.
- (17) In order to promote learning and the dissemination of culture Member States should permit certain organisations, namely those referred to in Article 5(2)(c) of Directive 2001/29/EC and film or audio heritage institutions, which operate on a non-profit making basis, as well as public service broadcasting organisations, to make available and reproduce orphan works, provided such use fulfils their public interest missions, notably preservation, restoration and the provision of cultural and educational access to [...] their collections, including their digital collections. Film or audio heritage institutions should, for the purposes of this Directive, cover organisations designated by Member States to collect, catalogue, preserve and restore films and other audiovisual works or phonograms forming part of their cultural heritage. Public service broadcasters should, for the purposes of this Directive, cover broadcasters with a public service remit as conferred, defined and organised by each Member State.

- (18) Contractual arrangements may play a role in fostering the digitisation of European cultural heritage, it being understood that libraries, educational establishments, museums or archives, film or audio heritage institutions and public service broadcasting organisations may, with a view to undertake the uses permitted under this Directive, conclude agreements with commercial partners for the digitisation and making available of orphan works. These agreements may include financial contributions by such partners. The agreements should not impose any restrictions on the beneficiaries of this Directive as to their use of orphan works and should not grant the commercial partner any rights to use or control the use of the orphan works.
- (19) In order to foster the Union's citizens' access to Europe's cultural heritage, it is also necessary to ensure that orphan works which have been digitised and made available to the public in one Member State are also available in other Member States. Publicly accessible libraries, educational establishments, museum, archives, film or audio heritage institutions and public service broadcasting organisations that use an orphan work in order to achieve their public interest missions should be able to make the orphan work available to the public in other Member States.
- (20) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation.
- (21) *Deleted.*
- (22) *Deleted.*

(23) Since the objectives of the action to be taken, namely legal certainty with respect to the use of orphan works, cannot be sufficiently achieved by the Member States and can therefore, by reason of the uniformity of the rules governing the use of orphan works be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not exceed what is necessary to achieve those objectives.

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Subject matter and scope

1. This Directive concerns certain uses of orphan works undertaken by publicly accessible libraries, educational establishments, or museums, as well as by archives, film or audio heritage institutions and public service broadcasting organisations in order to achieve aims related to their public interest missions.
2. This Directive applies to:
 - (1) 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,
 - (2) 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
 - (3) Cinematographic or audiovisual works and phonograms produced by public service broadcasting organisations before the 31 December 2002 and contained in their archiveswhich 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.

- 2a This Directive also applies to works and phonograms referred to in paragraph 2 that have never been published or broadcast but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightholders, provided that:
- (1) it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6.
 - (2) [...]
3. Works and other protected subject matter that are embedded or incorporated in the works or phonograms referred to in paragraph 2 and 2a should be understood as falling within the scope of this Directive.
4. This Directive does not concern and is without prejudice to any arrangements concerning the management of rights at national level.

Article 2
Orphan works

1. A work or a phonogram shall be considered an orphan work if the rightholders in the work or phonogram are not identified or, even if identified, are not located after a diligent search for the rightholders have been carried out and recorded in accordance with Article 3.
2. Where a work or phonogram has more than one rightholder, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with Article 3, the work or phonogram shall be considered an orphan work insofar as the rights of the non identified or non located rightholders are concerned.

3. The provisions of paragraph 2 are without prejudice to the rights of the rightholders in the work or phonogram which are identified and located.
4. This Directive is without prejudice to national provisions on anonymous or pseudonymous works.

Article 3 *Diligent search*

1. For the purposes of establishing whether a work or phonogram is an orphan work, the organisations referred to in Article 1(1) shall ensure that a good faith and reasonable diligent search is carried out for each work or other protected subject matter by consulting the appropriate sources for the category of works and other protected subject matter in question.
2. The sources that are appropriate for each category of works or phonogram shall be determined by each Member State, in consultation with rightholders and users, and include at least the relevant sources listed in the Annex.
3. A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast. In the case referred to in Article 1(2a) the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is located. If necessary, additional consultation of information available in other countries shall be undertaken.
4. *Deleted.*
5. Member States shall ensure that the following information is publicly accessible [...] in a single online database at national level:
 - (1) the results of the diligent searches carried out in their territories;
 - (2) the use of orphan works on the basis of the diligent searches carried out in their territories; and
 - (3) any change of the orphan status of the works or phonograms included in the database.

6. Member States shall ensure that the organisations referred to in Article 1(1) maintain records of diligent searches and that the organisations provide the following information to the database referred to in paragraph 5 in the Member State where the [...] diligent search has been carried out pursuant to paragraph 3:
- (1) the result of the diligent search;
 - (2) the use they make of orphan works, including on the basis of a diligent search carried out by other organisations;
 - (3) any change of the orphan status of the works or phonograms they use; and
 - (4) information relevant to identify and contact the organisation that transmits the information mentioned in paragraph 6(1)-(3).
7. [...]

Article 4
Mutual recognition of orphan work status

A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States and may be used and accessed in accordance with this Directive in all Member States.

Article 5
End of orphan work status

Member States shall ensure that a rightholder in a work or phonogram considered to be orphan has, at any time, the possibility of putting an end to the orphan status. In the case referred to under Article 2(2) Member States shall ensure that a rightholder in a work or phonogram has, at any time, the possibility of putting an end to the orphan status insofar as his rights are concerned.

Article 6
Permitted uses of orphan works

1. Member States shall provide for an exception or limitation to the reproduction and the making available rights provided for in Article 2 and 3 of Directive 2001/29/EC respectively to ensure that the organisations referred to in Article 1(1) are 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.
2. The organisations referred to in Article 1(1) may only use an orphan work in accordance with paragraph 1 in order to achieve aims related to their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works and phonograms contained in their collections, provided that the use 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.
3. This Directive is without prejudice to the freedom of contract of such organisations in the pursuit of their public interest missions, in particular to public-private partnership agreements.
4. Member States shall ensure that the organisations referred to in Article 1(1) indicate the name of the identified authors and other rightholders in any use of an orphan work.

5. Member States shall provide that a fair remuneration is due to rightholders that put an end to the orphan status of their works and other protected subject matter for the use that has been made by the organisations referred to in Article 1(1) of such works and other protected subject matter in accordance with paragraph 1.

Article 7
Authorised uses of orphan works

Deleted.

Article 8
Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract, rules of the freedom of the press and freedom of expression in the media.

Article 9
Application in time

1. The provisions of this Directive shall apply in respect of all works and phonograms referred to in Article 1 which are, on *[transposition date]*, protected by the Member States' legislation in the field of copyright.
2. This Directive shall apply without prejudice to any acts concluded and rights acquired before *[transposition date]*.

Article 10
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by at the latest. They shall forthwith communicate to the Commission the text of those provisions⁴.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 11
Review clause

The Commission shall keep under constant review the development of rights information sources and shall, at the latest one year after the entry into force of this Directive, and at annual intervals thereafter, submit a report concerning the possible inclusion in the scope of application of this Directive of works or other protected subject matter not currently included in such scope, and in particular stand alone photographs and other images.

By [*one year after transposition date*], the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee, a report on the application of this Directive, in the light of the development of digital libraries.

When necessary, in particular to ensure the functioning of the Internal Market, the Commission shall submit proposals for the amendment of this Directive.

⁴ If justified, the issue of explanatory documents will be addressed in a recital, in accordance with the Joint Political Declaration.

Article 12
Entry into Force

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 13

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

The sources referred to in Article 3(2) shall include the following:

- (1) For published books:
 - (a) Legal deposit;
 - (aa) The publishers' and authors' associations in the respective country
 - (b) Existing databases and registries, including ARROW (Accessible Registries of Rights Information and Orphan Works) and WATCH (Writers, Artists and their Copyright Holders) and the ISBN (International Standard Book Number);
 - (c) The databases of the relevant collecting societies, in particular reproduction rights organisations.
- (2) For newspapers, magazines, journals and periodicals:
 - (a) Legal deposit;
 - (b) The publishers associations in the respective country and the authors and journalists associations;
 - (c) Indexes and catalogues from library holdings and collections;
 - (d) The databases of relevant collecting society including reproduction rights organisations;
 - (e) The ISSN (International Standard Serial Number) for periodical publications;
- (3) *Merged with point (2).*
- (4) For visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and others that are contained in books, journals, newspapers and magazines or other works:
 - (a) The sources referred to in points (1) and (2);
 - (b) The databases of the relevant collecting societies in particular for visual arts and including reproduction rights organisations;
 - (c) The databases of picture agencies where applicable.

(5) For audiovisual works and phonograms:

(a) Legal deposit;

(aa) The producers' associations in the respective country;

(b) Databases of film or audio heritage institutions and national libraries;

(c) Databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Sound Recording Code) for phonograms;

(d) The databases of the relevant collecting societies in particular for authors, performers, phonogram producers and audiovisual producers.

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