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CreativeMediaBusinessAlliance

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CMBA POSITION ON THE PROPOSED “ORPHAN WORKS” DIRECTIVE (COM(2011) 289 final)

The undersigned organisations of the Creative Media Business Alliance (CMBA) would like to underline several important matters regarding the Proposal on certain permitted uses of orphan works, which – if left unaddressed – will have inevitable negative consequences for the creative industries in Europe.

A. General remarks

Foremost it should be noted that **copyright is protected at the EU level as a fundamental right, as confirmed by both the EU Charter of Fundamental Rights and the Court of Justice**ⁱ. As such, measures that could potentially amount to restrictions on a right of property like copyright must always be crafted with the greatest caution.

CMBA supports the Commission’s objective to create a European legal framework for the lawful cross-border access to orphan works for certain sectors where the need for legislative intervention has been proved. The purpose of the Directive is to find solutions to the specific issue of orphan works. It must be recalled that the question of mass digitization (national arrangements in place or under development) is a separate one.

Furthermore, given that the scope and amplitude of the issue vary greatly from one sector to another, and as the proposed legal instrument will not deliver the same results for all sectors **any legislative approach to the orphan works problem should be sector-specific**.

CMBA considers that the goal of the Directive should be to give legal certainty for all the stakeholders on the orphan status of some works and for this, any authorised use of orphan works should only take place after a **certified good faith due diligence search** for the right holder(s) has been carried out. In addition, CMBA reiterates a **need for an exhaustive list of authorised uses of orphan works** which ensures that any use by public service organisations under their public interest missions is **not for direct or indirect economic or commercial advantage**. Indeed, any potential commercial use of copyright-protected (albeit orphaned) works should not be authorised by this Directive.

At the EU level, the Better Regulation principles and the need to make comprehensive impact assessments play a key role before any legislative proposal is put forwardⁱⁱ. In the case of orphan works, CMBA is concerned that the scope of the proposal as it stands now and the substance of some of its specific provisions fail to meet the Better Regulation requirements. We would therefore like to make concrete recommendations to the EU co-legislators in order to make sure that the final “Orphan Works” Directive truly and efficiently meets its stated objective.

CMBA recommendation: *The future Directive should include a clearer reference to the crucial role of exclusive rights in the field of copyright as a means of fostering creativity, innovation and the necessary related investment. In the current proposal, Recital 13 makes only an oblique reference to the importance of copyright.*

B. Detailed comments

CMBA's recommendations fall into five main categories relating to "scope", "beneficiaries", "permitted uses", "diligent search" and "termination of the status of orphan work", which are outlined below.

1. Scope of the Directive

CMBA would like to highlight that the Directive covers orphan works only, in line with the stated objective to find a solution to a precise problem: the reproduction and making available of in-copyright works whose rights holders cannot be identified or located.

CMBA understands that the scope of the proposal is to cover both print material (books, journals, newspapers, magazines and other writings) as well as audio-visual content (cinematographic, radio and audiovisual works). Regarding the "book publishing" sector, we would like to point out that the industry has been working for quite a while on developing solutions to facilitate the accessibility of orphan works. Indeed, a consortium of European national libraries, book publishers and reproduction rights organisations including authors have worked together to develop the eContentPlus project ARROW (Accessible Registries Rights Information and Orphan Works towards Europeana). ARROW facilitates access to rights information available from a predefined set of sources, to determine the rights' status of a book to be digitised and made available online, and to eventually redirect libraries to the relevant rights clearing centres or to individual contacts. In the long term, ARROW aims to create an infrastructure to exchange rights information at EU level, based on open standards.

As ARROW clearly illustrates, the members of CMBA support practical solutions combined with legislative intervention where there is a proven need and respecting the specificities of the sector concerned. With this in mind, we do not consider the draft Directive well adapted to all sectors, due to structural differences, notably with regard to terminology and methods of exploitation.

CMBA recommendations: Given that the scope and amplitude of the issue of orphan works vary greatly from one sector to another, and as the proposed legal instrument will not deliver the same results for all sectors any legislative approach to the orphan works problem should be sector-specific. Therefore, the impact and suitability of the proposed legal instrument for some sectors, notably in light of pre-existing Memorandums of Understanding (MoU) should be considered in more detail, keeping in mind potential negative impacts as a result of inclusion in the current proposal.

2. Beneficiaries

Article 1.1 enumerates the potential beneficiaries (i.e., publicly accessible libraries, educational establishments or museums as well as archives, film heritage institutions and public service broadcasting organisations). CMBA believes it is of utmost importance that beneficiary institutions should be completely publicly funded and their activity of a purely non-commercial kind. In other words, it should be clear that the beneficiaries of the proposal are public service organisations for public mission interest defined purposes.

CMBA recommendations: *CMBA is of the opinion that the proposal requires a tightening of the wording of the definition of the beneficiaries to make sure that the Directive effectively meets its objective of ensuring lawful cross-border access to orphan works for public mission interest defined purposes. A clearer definition would also help to prevent potential distortions of competition arising due to differing classifications of beneficiaries in Member States. For the purpose of this Directive, a harmonized EU definition of “public service organizations” would be warranted to avoid patchwork application.*

3. Authorised uses of orphan works

Article 6 of the proposal foresees that the beneficiaries of the Directive are authorised to use an orphan work by means of the “reproduction” and “making available” rights. The same article 6 further specifies that these potential uses should be limited and hence mentions “preservation, restoration and the provision of cultural and educational access to works contained in their collections.”

CMBA understands this rationale but is concerned that the Directive could be undermined by the facts that (i) the list of authorised uses is not enumerated exhaustively in Article 6 of the proposal, and (ii) Article 7 opens up the authorised uses even further by allowing Member States to authorise the use of orphan works for other purposes than those referred to in Article 6. This could severely undermine the stated goal of the proposal of “harmonisation” and the principle of “mutual recognition of orphan work status” (Article 4). Moreover, Article 7 could also lead to authorising a series of potentially commercial uses of copyright-protected works. This section therefore lacks the minimum amount of legal certainty necessary to ensure that the Directive balances its goals of preservation and access against the adverse impact that would arise due to insufficient tailoring of its provisions.

CMBA recommendations: *CMBA considers that the goal of the Directive should be to give legal certainty to both beneficiaries and right holders. For this, the list of authorised uses of orphan works under Article 6 of the proposed Directive must be exhaustive to ensure that use by beneficiaries of the Directive is not made for direct or indirect economic or commercial advantage. There is also the need for sector-specific safeguards to ensure there are no abuses of competition in this regard. In addition, Article 7 should be deleted.*

4. Diligent search

Article 2 of the proposal provides a definition of the notion of “orphan works” and underlines the importance of carrying out a diligent search for the right holder to assess the status (i.e., orphan or not) of a given work. However, it states that the diligent search “is required to be carried out only in the Member State of first publication or broadcast”. Article 3 expands on the notion of “diligent search” and stipulates that the sources to be consulted – including those listed in the Annex to the Directive – are to be determined by each Member State in consultation with right holders.

CMBA is of the opinion that the definition of diligent search is very much in need of improvement. First of all, the diligent search must be certified to ensure legal certainty. Any sector-specific arrangement to use of orphan works should only intervene after a good faith due diligence search for the right holder(s) has been carried out and duly certified before any use of the works. Without certified good faith due diligence search of right holder(s), the system of authorised uses of orphan works will lack its necessary basis resting on legal certainty. In addition, CMBA also considers that it should not by law be limited to the Member State of first publication or broadcast. Indeed, not only is it crucial to stress that search guidelines should not be static (and thus be subject to change, particularly given the rapid development of technology) but it is equally important to understand that by limiting the scope of search to one country, the proposal potentially condemns a work to orphan status when relevant information may be easily available in another Member State. For instance, the country of first publication may not, for historical reasons (resources, war, tradition, etc.), have the best information available. As a further example, many works may be the results of collaborative efforts between right holders located in different Member States, each having a connection with the creation of the work, if not its initial publication or broadcast. There would appear to be no reason why all logical points of potential connection to the work should not be included in the concept of diligent search.

With regard to due diligence, CMBA would like to point out that this requirement should be understood without prejudice to existing arrangements in the Member States concerning the management of rights, such as extended collective licenses. We are therefore supportive of Recital 20 of the proposal, which simply states that specific arrangements at national level should be unaffected by this Directive.

CMBA recommendations: *The definition of “diligent search” should be improved and some of its components clarified (e.g., the meaning of “consulting sources” and “publicly accessible”, the status of the Annex). Most importantly, the search criteria should be “agreed” by all stakeholders at national level, including right holders. In addition, the search should be limited neither to sources identified by Member States and the Annex, nor to the Member State of publication. In this framework, the Annex should at a minimum include the list set forth in the EU “Memorandum of Understanding on orphan works”ⁱⁱⁱ signed on 4 June 2008 by representatives of right holders and cultural institutions. A harmonized EU definition of “diligent search” setting forth certain minima – as to which anything less would not be deemed diligent – would reduce the risk of seeing the notion of diligent search in practice functioning very differently from one Member State to another. It would also be useful to import the notion of “good faith” found in Recital 12 of the proposal into Article 3 of the Directive. The diligent search must also be certified to ensure legal certainty.*

5. Termination of “orphan work” status

We understand the concept of mutual recognition of the “orphan work” status to be a cornerstone of the proposal. CMBA sees merit in taking such an approach, but only provided that the overall language of the Directive is tightened in line with our comments made above under points B.1, B.2, B.3 and B.4. Bearing in mind that the premise of the proposal is that orphan works should be able to circulate in the EU, it means that a specific work “orphaned” in one Member State will be deemed to be orphan across the whole of the EU. In light of this and bearing in mind that the proposal judiciously foresees that a right holder coming forward has the power to end the orphan status of his work within an unlimited period of time, Article 5 should be made more efficient by also defining a uniform EU procedure for ending the orphan status of works.

CMBA recommendation: *CMBA shares the view that the procedure for ending the orphan status of copyright-protected works should be uniform across the EU. In other words, it is vital that a right holder coming forward can rely on a single procedure established at the EU level.*

We thank you for your attention and remain at your disposal should you have any questions.

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The Creative Media Business Alliance (CMBA) is an informal grouping gathering Europe’s top media and creative businesses and industry associations. It was launched in November 2004 to give the European content and media sector a strong and united voice at EU level. The companies we represent invest creative efforts, time and financial resources in developing, financing and publishing a wide range of broadcasting, games, music, film, book, magazine and newspaper offers, including on the Internet. Following the publication of the European Commission’s proposal for a Directive on certain permitted uses of orphan works (hereinafter “the proposal”), we would like to take the opportunity to submit some comments relevant to creative media industries.

ⁱ See Article 17.2 of the EU Charter and – among recent jurisprudence of the EU Court of Justice – the *Promusicae* and *Laserdisken* decisions.

ⁱⁱ See http://ec.europa.eu/governance/better_regulation/index_en.htm

ⁱⁱⁱ See http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/memorandum.pdf