

CEPIC – STATEMENT on proposed directive on certain permitted uses of orphan works
15.07.2011

CEPIC was founded in 1993 to have a unified representation in light of new legislation emerging from Brussels. Registered as an EEIG (Economic European Interest Group) in Paris in 1999, it achieved observer status at WIPO (World Intellectual Property Organisation) in 1997.

As the Center of the Picture Industry, CEPIC federates nearly a thousand of picture agencies and photo libraries in 20 countries across Europe, both within and outside the European Union. It has affiliates in North America and Asia. CEPIC's membership includes large and smaller stock photo libraries, major photo news agencies, art galleries and museums, video companies. CEPIC has among its members the big global players such as Getty and Corbis. Through this membership, CEPIC represents more than 150.000 authors in direct licensing. The annual CEPIC Congress is the largest global gathering of the international photo community and extends CEPIC's network on all five continents. CEPIC has been a member of IPTC since 2005 and of ICOMP since 2009.

Our members are producers, collectors and distributors of content – moving and still images. They are well versed in dealing with rights issues such as the right to reproduce, moral rights of authors and the global distribution of assets for commercial and non commercial use. Our members have been digitising content for over 15 years, and making the resulting digital asset available for commercial use, such as to newspapers, magazines and broadcasters, off and on-line, as well as in non-commercial environments for the purposes of research and education.

Alongside the need for access comes the need to support the creative economy that produces and delivers this work, namely the artists and those that make their work available. CEPIC's imperative is to ensure that the creators are the beneficiary of direct payment over collective management of rights, which should be exceptional and reserved to mass usages. We believe that based on its professionalism and IT experience, our industry is in a position to propose solutions to the challenges of the Digital Age.

We commend the European Commission for its initiative in tackling the complex issue of orphan works. We have been following the discussion since the American Orphan works bill of 2006. We spoke at the expert hearing organised by the European Commission in October 2009 and have followed evolution closely ever since. We are a partner in the ARROW PLUS project dealing with rights information and orphan works in mass digitization projects.

This paper presents our main comments to the published proposal.

- (1) Mutual Recognition of Orphan Works**
- (2) Exclusion of stand alone photographs from the scope of the Directive**
- (3) Ambiguous status of embedded visual works in printed works**
- (4) Genuine Diligent Search**
- (5) Validation of the Diligent search**
- (6) Commercial usages.**

1. **Mutual Recognition of Orphan Works.** We are happy with the terms set out in the EU proposal regarding orphan works which limits itself to establishing the principle of Mutual Recognition of the orphan work status within the European Union but does not impose a management procedure of the orphan works (OW), such as for example extended collective management (ECL). Our members have different experiences with collecting societies based on different national traditions. We believe that it is wise to leave the management of rights at national level.

2. **Exclusion of stand alone photographs from the scope of the Directive.** We also welcome the fact that the Directive excludes stand-alone photographs. This means that the copyright protection of these photographs will not be weakened. However, we welcome the exclusion only under the understanding that the objective is to tackle the issue on due course.

In its original Directive draft, the Commission indicated that: “*The issue of orphan works in the audio-visual and photography sector will be analysed in the forthcoming Green paper on audio-visual productions: challenges and opportunities.*” We urge the Commission not to drop photography – but not only photography, all visual material including graphics and maps – either in its up-coming Green Paper on audio-visual productions or within the framework of Michel Barnier’s IPR policy implementation.¹

The special problem of pictures with regards to orphan works is lack of attribution due to bad practices and stripped metadata, which make the picture *look* orphan. In the current background where users, especially on-line users, are eager to use material for free, it is essential for the survival of our industry to ensure that this “orphanage process”, apparent or due to the untraceability of the author, does not lead to a total buy out of photographic rights.

In any case, the exclusion of stand-alone photographs from the scope of the Directive, does not suppress the issue of photographic rights altogether, when photographs are licensed as part of another product: the book, the magazine, the newspaper etc. Photographers and their representatives make their activity profitable by licensing the same picture again and again. New income stemming from new usages of a few pictures is essential to secure the viability of the picture business². Publishers may deem a work to be out of print or out of commerce, yet the images embedded in the works may be of great value and continue to be exploited/ licensed. These photographs are our greatest area of concern.

3. **Ambiguous status of embedded visual works in printed works.** This is why we are worried about the wording adopted in *Article 1.* of the proposal, *Subject Matter and Scope.* While the original draft of the directive explicitly referred in its Article 1 to “*visual works such as fine art, photography, illustration, design, architecture, sketches of the later works and others ...*”³, this reference has been dropped in the main text of the present proposal.

The Explanatory Memorandum does state that the Directive, in the print sector covers visual works. Also Annex I of the proposal dedicates sub-section 4. to visual works. This sub-section would serve no purpose if the intention was to exclude such works from the scope of the directive.

However, the inconsistency in the wording of the Directive makes the status of visual works ambiguous.

The present wording, or lack thereof, may lead to the wrong assumption that any visual works embedded in books, magazines, newspapers or other writings will be considered “orphan” as soon as the “orphan status” of the main work has been established. This would mean that in most cases visual rights holders would be deprived from an equal treatment as the rights holders covered by the directive. Furthermore, if as stated in Article 7 of the proposal, these works can be used for commercial purposes, rights holders would be deprived from revenues without first being given the

¹ The hearing of December 2010 focused on audio-visual material. Visual authors were not invited to the hearing.

² This is true not only for photographers represented through picture agencies but also for photographers working on assignment and setting up their own archive or for press photographs which will get documentary and archive value long after the news has been published.

³ Draft of October 2011 on “mutual recognition of orphan works in the print sector”

opportunity to be located through a diligent search. This is a discriminatory treatment that isn't justified.

The Directive should provide all works with an equivalent protection. There is no justification to discrimination. In order to ensure that visual works are not discriminated against, we are asking to revert to the original, unambiguous, formulation of Article 1. and re-insert the reference to pictures. The reference to “maps” should be included as well.

Article 1

Scope

(1) *This Directive concerns: (...)*

- *Visual works such as fine art, photography, illustration, design, [maps] architecture, sketches of the latter works and other that are contained in books, journals, newspapers, magazines or other writings [held by these institutions].*

4. **Genuine Diligent Search.** Our next concern goes to the carrying out of a “Diligent Search”. While we understand that the Directive is being proposed in order to facilitate the digitization of our cultural heritage, we should ensure the “Diligent Search” does not become a mere formality. A Diligent search should be carried out with the genuine intention of finding the rights holders not as a mere formality for obtaining “Orphan” status.

This is even more important as the proposal allows for commercial usages in its Article 7.

If you closely read sub-section 4 of Annex I (which as stated in Article 3 represents a minimum list), you can see that the database of picture libraries/ agencies comes at the end of the list as the last resort. In reality, it should be the most important source for a diligent search – and should come at the top of the list.

As noted under point 2. of this Statement, “orphanage” by pictures are usually the consequence of poor crediting – The name of the photographer or even of the source is missing. Enquiries at a collecting society for visual arts would therefore be useless in most cases. Firstly, in many cases for photography, collecting societies do not handle the rights of reproduction of the photographers but only the reprographic rights. Secondly, these societies do not hold, or even show the works, of the artists so that their name database would be of little use in most cases. A user interested in finding out the copyright status of a work should therefore be recommended to make first enquiries in a picture library where the probability that he tracks the work and/or his owner is the highest. Databases of picture agencies contain an important amount of information beyond the name and contact of the author: licensing history, limitations of usages other than copyright such as personality rights, description of the content of the picture⁴. The number of libraries/ agencies is limited, they are specialised in subject matters limiting the scope of the search even further, and CEPIC can provide a list.

⁴ In the course of the Orphan Works debate and of the Arrow Plus project, CEPIC is working on a database enabling the “Diligent Search” in order to make the finding easier.

5. **Validation of the Diligent Search.** Validation of the search seems to be left to the good judgement and good faith of the users who have carried out the search and want to use the work. The proposal is not clear on how the status of an OW will be communicated across Europe such that it is not a burden to rights owners to check that rights inherent in their work have not been given an OW status.

This “light” procedure may have been acceptable in the context of a strictly non commercial usage of the orphan works and in the context of mass digitization programmes. Unfortunately, the proposal goes beyond the outspoken purpose of the Directive⁵ by opening the door to all kind of exploitations for these “orphan works”, including commercial exploitation.

6. Commercial usages. This brings us to Article 7. The combination of Article 6 “Permitted Uses of Orphan Works” and of Article 7. “Authorized Usage of Orphan Works” makes it plain that the proposal opens the door to commercial usages, although the word “commercial” appears nowhere⁶. In the French version of the proposal, Art. 6 and Article 7 bear the exact same title: “*Utilisation autorisées des oeuvres orphelines*”, so that, in fact, it is impossible to know which of these articles spells the Rule and which the Exception to the Rule.

Once all stocks digitized for the public good and for EUROPEANA, it is to be expected that public institutions listed in Article 1 of the proposal will want to generate additional revenues. Similarly, the “commercial partners” allowed by the Directive in its Consideration 18 and in Article 6-3 to support these public institutions in their digitization efforts, will want to commercially exploit these works to their greatest benefit.

CEPIC believes that preservation of our common European cultural heritage should be encouraged by the legislator. We also think that a commercial exploitation of the works may have been acceptable as a way to recoup the costs of digitization and in order to support public institutions in carrying out their public mission. However, not only does Article 7 go far beyond the outspoken purpose of the Directive, but it creates special conditions for these public institutions, as new players on the commercial market. They enter in competition with the rights holders who, as mentioned under **point 5.**, are left with insufficient security and carry the burden and the cost of the proof.

Considering that Article 7. is presented as an exception to Article 6, we believe that as a minimum requirement, it should spell out what types of uses are intended to be covered by this exception and not leave it to each Member State to determine them.

28.06.2011, Sylvie Fodor

⁵ [Quote] The main objective of this proposal is to create a legal framework to ensure the lawful, crossborder online access to orphan works contained in online libraries and archives.“

⁶ Article 7’s wording “*purposes other than those referred to in Article 6(2)*” opens the door to all kind of exploitations and for all kind of purposes.