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COMMISSION STAFF WORKING PAPER
SUMMARY OF THE IMPACT ASSESSMENT
ON
THE CROSS-BORDER ONLINE ACCESS TO ORPHAN WORKS

Accompanying the document

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

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Executive Summary

The impact assessment deals with copyright authorisations necessary to make so-called "orphan works" available online as part of European and national digital libraries. Orphan works are works whose copyright owner cannot be identified or traced.

The impact assessment was discussed at three meetings of an inter-service steering group on 11 March, 16 and 27 April 2010. It was discussed before the Impact Assessment Board (IAB) on 16 June 2010. The IAB issued its opinion on 21 June 2010.

Problem Description

Prior authorisations are necessary to make works protected by copyright available to the public in an online digital library. When the relevant copyright owner cannot be identified or found the works in question are orphan works. Consequently, the necessary authorisations to make these works available online cannot be obtained. Libraries, archives and other public service institutions that make works available online to the public without prior authorisation risk infringing copyright.

Policy context

The main objective of this proposal is to remedy the absence of a legal framework governing the lawful, cross-border online access to orphan works contained in libraries and archives.

The impact assessment explains that, given the urgency to boost the development of Europe's digital libraries and archives and its capacity to foster search and indexing technologies, the focus of the legislative proposal will be on works which are published in the form of books, journals, newspapers, magazines or other writings, including works embedded in them,¹ as well as audio, audiovisual and cinematographic works. Improving online search facilities will increase the accessibility of millions of sources found in Europe's libraries on both a national and cross-border basis.

This initiative builds on the Commission's 2006 Recommendation on the digitisation and online accessibility of cultural content and digital preservation.² Despite the Recommendation, only a handful of Member States have implemented orphan works legislation. The few existing national solutions are circumscribed by the fact that they limit online access to citizens resident in their national territories.

The creation of a legal framework to facilitate the cross-border digitisation and dissemination of orphan works in the single market is also one of the key actions identified in the Digital Agenda for Europe³ which is part of the Europe 2020 Strategy.⁴

¹ By contrast, it would be extremely difficult to identify the owners of entire collections of photographs whose provenance is unknown. The lack of attribution or other identifying information makes diligent search particularly difficult. Moreover, the technology to carry out visual searches as compared to text based searches is not as highly developed and is very costly.

² Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation (OJ L 236, 31.8.2006, p. 28-30).

³ A Digital Agenda for Europe - COM(2010) 245.

⁴ Europe 2020: A strategy for smart, sustainable and inclusive growth:
http://ec.europa.eu/eu2020/index_en.htm

Subsidiarity and proportionality

A legislative proposal in the form of a framework directive is necessary because voluntary approaches, notably Commission Recommendation 2006/585/EC of 24 August 2006, have not produced the desired result (subsidiarity). In addition, the coexistence of uncoordinated national approaches governing orphan works in online libraries makes it difficult for a library to make orphan works available across EU Member States.⁵

Because the orphan work problem is a major impediment to the creation of digital libraries, a coherent EU framework for cross-border access to orphan works is the least intrusive option to achieve the desired result (proportionality). All other approaches would require significantly more administrative overhead and licensing infrastructures just for orphan works.

Analysis of options

The impact assessment analyses six options: (1) do nothing, (2) a statutory exception to copyright, (3) extended collective licensing, (4) an orphan-specific licence granted by collecting societies, (5) an orphan-specific licence granted by a public body, and (6) the mutual recognition of national solutions regarding orphan works.

All policy options (except Option 1) are premised on the adoption of a directive that will require all Member States to enact specific orphan works legislation within a specified timeframe. All policy options, except Option 3, are premised on the requirement that a diligent search is necessary prior to the making available of an orphan work in an online digital library.

Option 3, the model of "extended collective licenses" assumes that, once a collecting society authorises a library to make books available on a website, this license, by virtue of a statutory presumption, will cover all orphan works in that category. The collecting society is considered to represent such "outliers" independent of whether it has carried out a diligent search to identify or locate the author. The Nordic model is mostly promoted by the Nordic Member States, although it is acknowledged that the absence of a diligent search makes this model less suitable as a European option based on mutual recognition. The absence of mutual recognition also implies that an extended collective license will only be valid in the national territory in which the statutory presumption applies.

The specific license for orphan works (Option 4) provides libraries and the other beneficiaries with a high level of legal certainty against damage claims by reappearing owners. This option cumulates the diligent search to determine the orphan status with a specific licensing arrangement pertaining to orphan works.

The government license covering orphan works (Option 5) constitutes a public certification of the diligent search and thus grants a high level of legal certainty to the digital library. This creates an administrative burden. This is why earlier incarnations of this system have had limited impact and are not used in relation to large scale digital library projects.

⁵ In some Member States, e.g. France, preparatory work on a legislative solution expressly acknowledges that a European solution is required - Conseil Supérieur de la Propriété Littéraire et Artistique *Commission sur les œuvres orphelines*, p. 19.

The statutory exception (Option 2) would avoid the burden of obtaining a copyright license but maintain the prior diligent search. However, this option provides for less legal certainty as there is no third party certification of the diligent search.

The advantage of an approach based on mutual recognition of national approaches to the making available of orphan works (Option 6) is that libraries and other beneficiaries would have legal certainty as to the "orphan status" and would be permitted to make these works available online. Mutual recognition ensures that the digital library would be available to citizens across Europe. The mutual recognition option is mostly advocated by the publishing community and some Member States. The publishers believe that a system that provides for the authorisation to make orphan works available online cannot dispense with an *a priori* diligent search.

Implementation, Monitoring and Evaluation

This proposal's key objective is to allow libraries and similar bodies which have public interest aims like education or the preservation and diffusion of cultural heritage to lawfully make available and reproduce orphan works. The implementation of the proposal should be conducted in line with the policy objectives and international copyright law.

The Commission will monitor the short, mid and long term impacts. In the short term, the Commission will ensure that orphan works legislation is adopted in all the Member States. In the mid-term, the Commission will assess whether the system of mutual recognition will provide for pan-European access to digital libraries from anywhere across the EU. In the long-term, the Commission will assess the extent to which orphan works legislation has contributed to the overall development of pan-European digital libraries.