

Wikimedia Deutschland e. V. – PO Box 30 32 43 – 10729 Berlin

Bundesministerium der Justiz
Referat III B3 Urheber- und Verlagsrecht
Mohrenstraße 37

10117 Berlin

Berlin, August 10, 2012

**Re.: Implementation of the future directive on the permitted uses of orphan works
Statement by Wikimedia Deutschland e.V.**

Dear Dr. Pakuscher,
Dear Ms. Gutjahr,

Many thanks for your letter of July 5 and for the opportunity to comment on the Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works (2011/0136 COD). On behalf of Wikimedia Deutschland e.V., I am very pleased to be sending you our statement on the matter. If you have any further questions, please do not hesitate to contact us.

We would very much welcome statements on draft legislation being published in the future – as is already the case with European Commission consultations. Therefore, we are in favor of making statements available on the website of the German Federal Ministry of Justice, provided there are no objections to the publication of such information. We preemptively agree to the publication of our statements. Please find enclosed our answers to your questions.

Best regards,



Jan Engelmann
Head of Politics and Society

1. The future directive would include works and phonograms that have never been published or broadcast but have been made publically accessible, with the consent of the rightholders, by one of the organizations specified in the directive. Member States can limit the scope of national regulations. They can stipulate that the new rules only cover those “works that have never been published or broadcast” that were given to one of the specified organizations with the approval of the rightholder prior to the transposition deadline (cf. Article 1(2a) of the provisional agreement on the future directive). Do you think it is advisable to limit the scope like this?

No, we do not think it is advisable. If the regulation applies to works that were given to organizations prior to the transposition deadline, then it should definitely apply to works that were given after the deadline. In the latter case, the rightholder is aware of the consequences; the holder who gives the work to the organization before the deadline is not. We see no reason for the latter cases to be treated any differently. Doing so could lead to legal uncertainty if it proves impossible to establish exactly when a work was given to an institution.

We believe that there is very little danger of the regulation deterring copyright holders from giving unpublished works to the specified institutions in future. This is because holders are generally unlikely to assume that their work will acquire orphan status in the future.

However, if the evaluation of the directive finds that this danger does exist, it would still be possible to solve the problem by introducing an opt-out regulation. This could be achieved by entering a contrary will in the EU-wide database to be set up under Article 3(4b) of the directive.

2. Member States are free to add further specifications to the requirements concerning the diligent search for the rightholder. The annex to the future directive contains a catalog of sources that should be consulted when searching for a rightholder. Member States can add to this catalog (see Recital 13 of the provisional agreement). Do you consider it advisable to add sources to the catalog? If so, which criteria should be used?

We do not think it makes sense to add to the catalog. It would, however, be desirable to specify the sources that are to be consulted in such a way as to create a specific, conclusive list. This would help to keep search costs to a minimum and would create the necessary legal certainty.

It is also important that all the listed sources are, without exception, freely accessible within the meaning of the 8 Principles of Open Government Data (<http://www.opengovdata.org/home/8principles>). This is the only way to ensure the availability of low-cost, professional search services and to encourage the development of appropriate business models. We are not happy with the extensive restrictions placed on companies not specified in the directive. Our concern is that the restrictions will mean that only very few commercial service providers will participate in digitizing works and making them available. We believe that they must be involved in these processes so as to help make our cultural heritage (which in many cases can no longer be put to commercial use) available to the general public. It is therefore crucial to establish open standards for the catalog and thus create the conditions necessary to simplify the development of appropriate business models and to boost competition within the digitization market.

It is also very much in the interests of publishing houses and collecting societies that their catalogs are included in the search. If they are, it will be possible to identify the rightholders of certain works and to conclude contracts on

the digital use of those works. We therefore see no reason to refuse publication of relevant data or to charge fees for searches.

3. Member States can choose to allow organizations other than those specified in the future directive to carry out diligent searches (for a fee) – see Recital 12 of the provisional agreement. This option, which was one of the results of the negotiations, is intended to express the idea that the privileged organizations can commission (for example) collecting societies to carry out the diligent search on their behalf. Do you consider it advisable for the transposing law to specifically include a rule that would allow the privileged organizations specified in the directive to commission other organizations with the search?

Yes. To create legal certainty, it is advisable to include such a rule and to specify the conditions governing the commissioning of organizations. We are worried that the directive's extensive restrictions concerning the participation of commercial partners would severely hinder efforts to collaborate with private companies, particularly in public private partnerships. Wikimedia Deutschland e.V. believes that it is crucial that commercial partners are involved in searching for rightholders and in preparing works and making them available so that the necessary resources for the comprehensive projects exist. As we know, the public sector struggles to handle large-scale digitization projects. It would therefore make extremely good sense for professional service providers to participate in searches for rightholders and in potential mass-scanning projects. However, it is crucial to ensure that collaborations on digitizing orphan works do not give rise to new intellectual property rights or exclusive usage claims.

4. The future directive stipulates that if a rightholder is identified after a work has been used, then the holder must receive fair compensation (cf. first sentence of Article 6(4a) of the provisional agreement). It is up to Member States to decide what constitutes fair compensation and when the organization in question should pay it (cf. second and third sentences of Article 6(4a), and Recital 16). What suggestions do you have for the specifications of this rule at national level?

To avoid an incalculable cost risk, which would be an unnecessary deterrent, the institution must be able to pay the full compensation in a single payment when it begins using the work. Retrospective obligations to pay license fees are too great a risk for cultural organizations – and are likely to deter many archives from using the works in question. Furthermore, such organizations are unlikely to have the means to set aside the necessary financial provisions.

Even though the probability of a rightholder making a claim in retrospect is relatively low, the financial risk for a single institution could become prohibitive if, for example, it uses an archive that is made up almost entirely of works belonging to a single rightholder. Therefore, countries need to distribute this risk across all organizations and they must make it possible for organizations to pay compensation in a one-off sum.

National governments also need to ensure that the one-off payment makes it possible for every other organization specified in the directive to use the work. This is the only way to ensure that archives are digitally expanded and amalgamated.

Most importantly of all, however, governments need to systematically rule out the “free-rider” problem. This refers to the danger that rightholders might wait until their work has been digitized and possibly “upgraded” (e.g.

restored) before claiming back their rights and using the works themselves. To address this issue, countries need a regulation that would require rightholders to reimburse the cost of digitizing a work if they use it for commercial gain after it has been digitized.

Further suggestions

Please allow us to go beyond the concrete questions that you posed and to make some further comments on the proposal for the directive.

a) The concerns about the proposal for the directive that we expressed in our statement of 10 August 2011 have by no means been resolved – on the contrary, they have grown. Hence, we fear that the proposed regulation will not provide an adequate solution to the problem of orphan works, particularly as it is limited to only a few privileged players. The current copyright situation means that much of the cultural material of the 20th century cannot be made publically accessible. This is not in the interests of users or rightholders. We therefore need a regulation that allows all those interested in doing so to make works accessible in a legally certain way that does not involve incalculable economic risks.

Hence, it is unclear why the group of privileged institutions tasked with digitizing orphan works and making them publically accessible remains limited to such a small number. Non-profit open-content projects such as Wikipedia or Wikimedia Commons can also argue that there is general interest in their work. Furthermore, the active volunteer communities that upload and look after the metadata of digitized representations, partly in cooperation with cultural institutions, prove their practical expertise and scrupulousness in dealing with copyright-protected works on a daily basis. The commercial use made possible by Wikipedia's free Creative Commons license, CC-BY-SA 3.0, should not be a systematic exclusion criterion. This license specifically does not allow digitized representations to be remonopolized, as it only permits the material to be transferred under the terms of the same license. This means that it generates a sustainability effect.

b) It is equally unfortunate that the catalog of provisions (Article 1(2) a-c) does not include photographs unless they have been published in books, magazines or journals. It can be said that the huge number of unpublished or uncataloged photographs for which the copyright and context of their origin can no longer, or only with great difficulty, be ascertained forms the main supply of orphan works. In the context of providing images for a free online encyclopedia such as Wikipedia, this material is an invaluable source for illustrating entries on topics like contemporary history. During the consultation process on the proposal for the directive, the interests of commercial photo agencies were apparently given priority over those of the general public. This is a major failing of the proposal. We hope that the Federal Government will tackle this particular failing when it implements the directive.

c) Of even greater concern is the fact that the proposal for the directive still does not provide a genuine incentive for mass digitization. The text does not specify either the time period or the exact process involved in a "diligent search". However, the search methods and parameters to be used must be defined in order to help prevent a serious underuse of cultural works in the future. One can only hope that the patchwork of diverging national solutions will be counteracted by the establishment of something like a "learning community", which will continually check if the practices involved are indeed effective.

d) We can expect that commercial use of the majority of the works initially classified as orphaned works, but whose rightholders are subsequently located, will not be possible. Hence, it would be a good idea to encourage rightholders to make these works available under a free license. As explained above, the ShareAlike clause contained in certain Creative Commons licenses can prevent “free riders” from acquiring works for their exclusive use. After choosing this type of license, the type should be entered in the database to be set up under Article 3(4b) of the proposal for the directive in order to provide legal certainty for further use of the material by third parties.

It would also make sense for rightholders located during the search to be offered a direct, lump-sum compensation payment (as described above) in return for making the work accessible under a free license. A note on this should be entered in the database to be set up under Article 3(4b) of the proposal for the directive.