

# EUROPEAN ECONOMIC AREA

## STANDING COMMITTEE OF THE EFTA STATES

Ref. 1110018

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### SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS

#### **EEA EFTA Comment on the Commission proposal for a Directive of the European Parliament and of the Council on certain permitted uses of Orphan Works, (COM (2011) 289)**

#### **EXECUTIVE SUMMARY**

The EEA EFTA States (Iceland, Liechtenstein and Norway) welcome the overall aim to facilitate online accessibility of European cultural content and digital preservation as set out in the proposal for a “Directive on certain permitted uses of orphan works”, COM (2011) 298.

It is the opinion of the EEA EFTA States that cost effective and administratively simple solutions should be sought to overcome the challenges connected to rights clearance of works still protected by copyright. With this as a background, we appreciate being able to provide some comments that we believe should be taken into account when searching for solutions for the so-called “orphan works” problem.

#### **1. INTRODUCTION**

1. It is the experience of the EEA EFTA States that the need to solve the challenges pertaining to the use of orphan works derives from the wish to facilitate mass digitisation. When a cultural institution digitises a large number of works, some of these are likely to be so-called orphan works and, as such, represent a problem for the general digitisation project.

#### **2. DILIGENT SEARCH**

2. The EEA EFTA States would like to highlight the system of Extended Collective Licensing (ECL) that is currently used in the Nordic countries. There are differences in the legislation between the countries, but the basic approach is the same. ECL is based on collective rights management and designed to handle mass use. The licenses to use copyright protected works are freely negotiated between collecting societies and the users of the works. Through provisions in the law, the negotiated agreement is given an extended effect in the sense that the agreement applies to rightholders that are non-

members of the contracting organisation. An Extended Collective Agreement provides the user legal certainty from being subject to copyright infringements. The collecting society is then responsible for distributing the revenue following the licensing. Non-members of the Collecting Society have the same right to remuneration as the members and they can also choose to opt-out of the agreement. Following this system, no diligent search is necessary.

3. Article 3 of the proposal suggests that the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out for each work, by consulting what is referred to as appropriate sources for the works in question.
4. The EEA EFTA States would like to stress that the proposal should take into account that, for the foreseeable future, there will be no full scale established registers of rightholders for the works in question. The EEA EFTA States acknowledge that a register can facilitate the search for an author of a book. However, currently no register is able to provide information on the contact details of the right-holder in question. Therefore, the search will have to be continued through other more conventional methods. Regarding the search for rightholders of works other than books, the EEA EFTA States are of the opinion that only limited sources are available to help identify and locate the authors. Particular concerns in this regard are the copyright protected works embedded in books, like illustrations, photographs, maps, as well as broadcasters' productions.
5. The EEA EFTA States are of the opinion that in digitisation projects which only encompass a limited numbers of work, solutions based on prior diligent searches for the copyright holders, might be a workable solution. The challenge will arise for mass digitisation projects, e.g. Europeana, where solutions based on a prior diligent search will not enable the EEA-countries to reach the goals set up for making copyright protected work available.
6. The EEA EFTA States would therefore like to stress the importance of accepting the continuation and further development of present schemes not based on prior diligent searches, like the Extended Collective Licensing system found in the Nordic countries.
7. The EEA EFTA States are of the opinion that the Commission should promote solutions based on agreements between the users and relevant rightholders.

### **3. SCOPE OF THE PROPOSAL**

8. The EEA EFTA States have, with great interest, taken note of the Memorandum of Understanding (MoU) reached between the rightholders and libraries concerning out-of-commerce literary works in books and periodicals, supported by the Commission. This MoU requires national legislative initiatives in the EEA-countries, and the Commission is called upon to find European legal solutions to make the proposed principles valid as well as to make the material available on an inter-territorial basis.
9. With this background, the EEA EFTA States find it natural that the Commission's proposal for a Directive on certain permitted uses of orphan works needs to be

amended in order to take on board such cross-border solutions, as called upon by the parties to the MoU.

#### **4. SHORTCOMINGS OF THE IMPACT ASSESSMENT**

10. The EEA EFTA States note that, on page 27 of the impact assessment to the Directive, the Commission has presented an analysis of extended collective licensing.
11. The EEA EFTA States regret to say that the analysis unfortunately has some shortcomings. In the evaluation, the Commission states that a drawback of extended collective licensing is the lack of differentiation between the tariff for orphan works and the rest of the works subject to licence. The “Bookshelf” project is used as an example. “The Bookshelf” project is the first and so far only project where copyright protected works are digitised on a large scale (50 000 books) and made available on the internet for reading by the audience. The EEA EFTA States would like to point out that tariff and payment systems in an extended licensing scheme are based on negotiations between the rightholders’ representative and the user.
12. In the assessment, the Commission uses the price laid out in the “Bookshelf” project, namely €0.067 per page per year, to approximate the cost of making available an estimated number of orphan works found in the collections of the British Library. Firstly, we would like to point out that the price and terms of an agreement are not likely to be the same in all European projects as the terms are negotiated between the contracting parties. Secondly, the analysis also wrongly draws the conclusion that all or most orphan works are books containing on average 185 pages. An estimated “Bookshelf” price of €13 per book is then wrongfully labelled as being the price per work. However, a book and a work are different entities and an orphan work will typically cover a fraction of a page (e.g. an illustration) and only on very few occasions a whole book, as suggested in the impact assessment.
13. Finally, the estimated 50 million orphan works in the British Library are not primarily found in books but rather in vast numbers of maps, newspapers, magazines, photographs and stamps, as well as sound recordings and films.
14. Also, it should be pointed out that when this analysis was first presented by the Commission, the Norwegian partners in the project pointed out, in a letter to the Commission dated 15 June 2010, that the analysis was based upon false presumptions.

#### **5. SUPPORT OF THE FINNISH PROPOSAL FOR AMENDMENTS TO THE PROPOSED DIRECTIVE**

15. The EEA EFTA States have keenly followed the legislative process around the proposed Directive. They have noticed that in the *Presidency compromise proposal* from 6 of October 2011, it was suggested to remove the word “existing” from recital 20 thereby aligning the proposal to recital 18 in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The same amendment to recital 20 has been put forward by the rapporteur of the Committee on Legal Affairs

in the European Parliament, currently amendment 15. The EEA EFTA States have expressed the need for this change informally before and strongly endorse the suggestions to this end. However, the EEA EFTA States believe further changes are needed to accommodate their concerns. Those concerns are covered in the Finnish Drafting proposal to the Working Party on Intellectual Property in the Council, dated 11 of October 2011.

16. The EEA EFTA States would like to express their support for the proposal for amendments to the proposed Directive on certain uses of orphan works as expressed by Finland. In short, we propose the following amendments in order to take into account the comments given above:
17. These suggestions are intended to complement the Presidency compromise proposal contained in 15190/11. They take as a presumption that Article 7 of the Commission proposal would be deleted.
18. *Recital (20) (Preamble) This Directive is without* prejudice to (...) arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, mandatory collective management, or similar arrangements, or combinations thereof.
19. *Article 7 (replaces Article 7 in the original proposal)*

*Licensing or authorisation arrangements and mutual recognition*

1. Member States may, instead of or in addition to the exception or limitation referred to in Article 6(1), establish a licensing or authorisation mechanism, supported when necessary by arrangements concerning the management of rights, having effect also on works on which a prior diligent search has not been made, including orphan works.
  2. Member States shall recognise the validity of each others' national solutions to implement Article 6(1), and recognise that the reproductions and the initial act of making available for the purposes of Article 6, and the provision of access to protected works outside the Member State of the initial act, are lawful acts (*mutual recognition*).
  3. Member States that choose a solution that imply a right to individual remuneration for the rightholders for the use made of their works according to this Directive, may introduce an obligation of diligent search *a posteriori*, and an obligation to reserve, for a time to be prescribed by law, a share of the remuneration to the rightholders of orphan works.
20. In addition, technical adaptations to Directive 2001/29/EC could be made, if deemed necessary.
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