

**Comments of the Association des Cinémathèques Européennes on the “Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works” (21/10/2011)**

*ACE welcomes the Directive which we consider as an appropriate instrument to widen up access to culture and knowledge. It will also have major benefits for education and research as well as the creative industries. In order to make it more applicable for cinematographic works, we propose the following amendments:*

Ad art. 1.2

*“This Directive applies to works first published, produced or broadcast in a Member State...”*

ACE proposes to use “country of origin” which is more appropriate for cinematographic works. In its current form the proposal does not address works where the country of origin is not known, as well as the problem of co-produced films and unpublished films. The definition within the orphan works directive should ensure that such works are not excluded:

*“If the country of origin cannot be determined, a search should be carried out in the Member State of the institution holding the work. The same should apply to unpublished works. For co-produced works, a search should first be carried out in the Member State where the institution holding the work is seated, as long as this also where one of the production companies is located. If the search is unsuccessful, it should be carried out in the Member State where the other co-production company is located.”*

Ad art. 1.2.2

*“Cinematographic or audiovisual works contained in the collections of film heritage institutions”*

ACE regrets that the Directive only covers part of the collections held in European film heritage institutions and does not consider film related materials such as photographs, posters, text documents, drawings etc. Such ancillary materials are very important when making films available.

Ad art.2.2

*“Where a work has more than one rightholder, and one of the rightholders has been identified and located, that work shall not be considered an orphan work.”*

There are always multiple rightholders to a film work and in case one rights holder is identified and located, the rights of the remaining authors should fall back into the orphan categories and therefore considered to be covered by the Directive.

Ad art. 3.1 jo. 3.2

*“For the purposes of establishing whether a work is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out for each work, by consulting the appropriate sources for the category of works in question.”*

Too much is left to Member States in this respect. ACE proposes to unify the search (like a ten step search to be conducted) using pre-determined local sources. The Diligent Search Criteria for Orphan Works established by the High Level Expert Group – Subgroup Copyright are a useful basis to perform a search, however ACE recommends to simplify the criteria.

Ad art. 3.3

*“A diligent search is required to be carried out only in the Member State of first publication, broadcast or in the Member State where the major production company (producer) has its seat, or in case the producer cannot be located, where the filmmaker resides*

Ad art. 6.2

*“...However, unless otherwise provided in Article 7, the organisations referred to in Article 1(1) may not use orphan works in order to achieve aims other than their public interest missions, notably preservation, restoration and the provision of cultural and educational access to works contained in their collections.”*

What exactly is considered a public interest mission and what not? It is important to establish the allowed uses as using orphan works for anything other than those missions is prohibited unless authorized by Member States.

Ad art. 7.2

*“Member States may chose the means for authorising use within the meaning of paragraph 1 and remain free to decide on the use of any revenues which are unclaimed after the expiry of the period fixed in accordance with paragraph 1(5).”*

*“Member States may chose the means for authorizing use within the meaning of paragraph 1...”*

It should be taken into account that these means must work for the cross-border online use of films. If Member States choose e.g. an ECL model, this may not work for cross-border permission and thus prohibit online use.

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