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from: General Secretariat
to: Working Party on Intellectual Property (Copyright)
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No. Cion prop.: 10832/11 PI 61 AUDIO 18 CULT 37 CODEC 926
Subject: Proposal for a Directive of the European Parliament and of the Council on certain
permitted uses of orphan works
- Non-paper on a single database for orphan works

Delegations will find in the Annex a Presidency non-paper on a possible single database for orphan
works for discussion at the Working Party on Intellectual Property (Copyright) on 17 February
2012.

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Presidency non-paper on Article 3

The mechanism for the use of orphan works as set out in the proposed directive is based upon the obligation on beneficiaries to carry out a prior diligent search for the rightholders in the works or phonograms they intend to use. Based on the discussions in previous Working Parties the presidency has sensed a need for further clarification on article 3 with regard to the obligations contained in this article as drafted in document 6191/12 which was distributed to Member States on February 10th.

The aim of the article, as has also been indicated by the Commission, has been to ensure that any obligation on Member States or beneficiaries in this respect constitutes the smallest burden possible. With this in mind the directive should allow Member States to keep databases as simple as possible requiring beneficiaries to provide no more information than strictly necessary. This presidency non-paper aims at clarifying the types of information which could be provided to such a database.

Possible key-information

A database should provide information on the results of the diligent searches carried out in each Member State's territory and on the use of the orphan works based on these diligent searches.

"The results of diligent search" implies that a database in the Member State where a diligent search has been carried out should indicate whether a specific work or phonogram is orphan/partial orphan or whether it is not an orphan because all rightholders have been identified and located.

The information should be kept up to date in order to reflect possible changes of the orphan status over time for example if a rightholder reappears and puts an end to the orphan status of a work or phonogram - this information should be recorded in the database.

The information could consist of a limited number of key elements related to a work which has been subject to a diligent search.

Information on the work or phonogram could include the following¹

- Title of the work or phonogram
- Type of work (e.g. book, film, phonogram, etc)
- Whether the work or phonogram in question is published or unpublished
- If published, date and place of publication, production or broadcast
- Information on rightholders (e.g. author, producer etc.)
- Indication as to whether the work or phonogram in question is orphan/partial orphan or not orphan.
- In the case of orphan and partial orphans; information indicating that
 - a) None of the rightholders have been identified or,
 - b) Any information on rightholders which have been identified but not located
(e.g. rightholders A, B, C, etc. have been identified but not located)

Information on "*The use of orphan works on the basis of the diligent searches carried out in their territories*" implies that a database should indicate if a work or phonogram is being used and by whom. This information should be submitted by the beneficiary/ies using the work or phonogram and should be kept up to date with regard to any additional information on the uses/users

The purpose is to provide reappearing rightholders with information on possible uses and users of a work or phonogram and thus enable the rightholder to put an end to the orphan status.

¹ Insofar as this information is known to the beneficiaries. In specific cases it should be possible for the beneficiaries to add, if they deem it useful, additional information useful to identify the work in the absence of other elements (e.g. factual description of an unpublished manuscript in the absence of a title etc).

Information on the use of orphan works could include the following:

- Use of the orphan work (e.g. the work or phonogram is being used, in this or that digitisation project)
- The contact information of the beneficiary/ies using the work or phonogram.

At the last Working Party the Commission gave a preliminary estimate of the possible cost of setting up a single online database in Member States. The Commission indicated that the cost would most likely not exceed 100.000 Euro. The annex to this document, contains a more detailed cost-assessment elaborated by the Commission together with the experts running the ARROW infrastructure ².

² Arrow is a system created by a broad consortium, including European and national representatives of all the stakeholders in the book sector (national libraries, publishers and authors association, collective management organisations) within a project co-funded by the European Commission. It aims at facilitating diligent search of rightholders in textual works. It includes a “Registry of orphan works” as one of the characteristics in a broader “Rights information infrastructure”. Information at www.arrow-net.eu.

ESTIMATE OF THE COSTS ASSOCIATED WITH THE CREATION OF NATIONAL DATABASES OF SEARCH RESULTS ELABORATED BY THE COMMISSION TOGETHER WITH THE EXPERTS RUNNING THE ARROW INFRASTRUCTURE

We provide two scenarios:

1. The cost of the basic solution to comply with the obligation of the Directive (as currently proposed by the Danish Presidency). This will be compared to the cost of a much more sophisticated system which also includes a complex administration system of claiming by right holders and an automatic system to feed the database directly with search results (the ARROW system).
2. A comparison between the cost of centralised national databases against one possible alternative where search results are stored and made available by the individual institutions and are accessible from one single access point at national level (the proposal in a previous draft Council proposal).

To assess the costs, we analysed concrete examples from the book sector, but there is no reason to think that these are different from other categories of works.

1. Costs of a national database

1.1. Implementation cost of a basic solution

A database of search results can be implemented at different level of sophistication. The basic one includes just a simple list of the works and the possibility to browse or query the database and retrieve the information about the individual titles.

The cost for developing such a basic solution is limited to the employment of few working days of software developers. It is estimated that this roughly requires 10-15 working days of medium qualified IT staff.

This estimation refers to a system that does not include an automatic feeding of information by third parties, so data from the beneficiary institutions should be passed to the central administrator of the database and uploaded by the latter. With a few additional working days, it would be possible to implement a system to feed the database remotely, e.g. starting from an Excel file provided by the users or such.

1.2. Implementation cost of a sophisticated solution

A much more sophisticated solution has been developed within the ARROW project, co-funded by the European Commission. ARROW is a complex system which serves two functions: it facilitates an automated search for the right status of works and their right holders and it is also a database of the search results which is directly fed by the search done by individual users. This system is much more sophisticated than the basic database outlined above in 1.1. Information is stored in relation to works, and for every work all the various manifestations (e.g. different editions, translations etc.) are listed. It also provides information about all the right holders in the work identified and not located, including links to information resident in library authority files as well as an interface for right holders, or their agents, to claim the rights. Furthermore, the system has been implemented to support multilingualism and allow a distributed administration: so that it is manageable at the same time by several entities in a single member state, within predefined authorisation models, or by several member states. The database is integrated in the workflow of the ARROW system, and thus is automatically fed at the end of each search conducted through ARROW.

The cost sustained by the ARROW consortium to create such a database can be estimated around 10% of the cost for design and implementation of the whole system. Since the latter was around one million euro, a reasonable estimation of the cost for the implementation of such a complex service is 100 000 euro.

1.3. Total costs including administration

In conclusion, the set up of a national database of orphan works ranges between few thousand euro for a basic solution to 100 000 euro for a sophisticated one. To have a complete picture, one can consider also the running administration cost. This will clearly depend on the level of use. However, it is reasonable that one full time employee is more than sufficient to manage the expected data flow even in the case of several digitisation projects running in the country.

2. Comparison with alternative models

The cost for the creation and management of a centralised system can be fully assessed only in comparison with the cost of possible alternatives. The previous draft of the proposed Directive provided a distributed system, where each institution using an orphan work should store and make available the search result, while the responsibility of the member states was limited to the creation of a single access point for this information.

To implement this solution:

- a) Each institution should create its own database;
- b) At central level, a portal to provide the single access point should be implemented.

The total cost is the sum of the two and is sustained for the first one by the institutions that in most cases belong to the public sector, and the second by the central administration of the member state.

A total estimate of the cost of a distributed system is difficult to produce since it depends on many factors, including the level of coordination between the nodes of the network. However, since the cost for the implementation of a database does not depend in a significant way on the number of records that it is able to handle, it is realistic for every institution to spend a sum that is close to that described above for the central database. The actual investment will depend again on the level of sophistication of the solution(s) involved.

The creation of a single access point depends on how the network of databases is developed. In principle, the best way is to provide *ex ante* sufficient specification for the databases, so as to make it easier to federate them for search purposes. Without this, the cost would be even higher than the creation of the central database.

In any case, some developments are required to create the single access point, which includes the federated search engine and the interface to allow users to access the information.

In conclusion, a model that envisages the creation of multiple databases and a single access point is surely more expensive than a model based on one single database at national level. The ratio between the two cost levels – at the same level of functionalities provided – is close to the number of databases created.

An additional element to be considered is that a single database concentrates the cost in a single point, at the central administration level, while the decentralised model distributes the cost among several institutions (which, however, as noted above belong, in most cases, to the public sector).

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