

ISF position statement in the light of current development of the Orphan Works directive (2 April 2012):

*In this version of our paper we have re-arranged our concerns in **order of priority**. We have also added some notes about possible negotiating positions which might help reach a text which will be useful to cultural institutions. Our new notes are indicated thus between lines of ******

1. *Remuneration for past use (this paragraph was number 2 in our original statement)*

The Legal Affairs Committee's amendments 13 and 44 introduce a requirement for remuneration, if a rightholder appears to assert his or her rights. The important point here is that the remuneration is to be paid for use dating from before the rightholder's appearance. We agree with the principle that a rightholders should be entitled to payment for the future use of their work (or to prevent such use), after they have appeared to make their claim. But payment for past use opens great uncertainty, contrary to the purpose of the Directive. **We ask for all requirements for remuneration for use prior to a rightholder's appearance, to be removed from the Directive, in order to restore the Directive's original purpose of removing uncertainty and legal risk from the use of orphan works by appropriate institutions.**

*Our favoured negotiating position on this point is given in **bold** for the reasons outlined above. **If the requirement for remuneration remains unchanged, the Directive will hardly be used, or will not be used at all.** If it is absolutely necessary to make concessions on this point, we should prefer the concept to be changed from remuneration to compensation, qualified so that (1) there is a presumption that public-mission uses by cultural institutions cause no harm to a rightholder; and (2) for compensation to be paid, the reverent rightholder must produce evidence of harm caused.*

2. *No 'commercial use' (this paragraph was number 3 in our original statement)*

All provisions for 'commercial use' were removed by the Legal Affairs Committee. This leaves a text full of inconsistencies. On the one hand, Recital 18 protects agreements with commercial partners; and Article 6(3) safeguards freedom of contract in general, and public-private partnership agreements in particular. On the other hand, with the deletion of Article 7, no permitted commercial uses survive. This situation is hardly logical. It is widely recognised that digitisation is expensive, and that cultural institutions are rarely well-funded. By this move, the Legal Affairs Committee has removed, provided benefits in both the public and private spheres. **We ask for the restoration of Article 7 in order to re-open the possibility of part-private funding.**

This is the second key area of concern - commercial uses are very important in order to give the Directive useful purpose. If commercial uses are not permitted in any form, then cultural institutions will not even be in a position to benefit from grants or sponsorship, because such funding always has a commercial purpose behind it.

works. These restrictions are unnecessary, because Article 6 (2) of the Orphan Works Directive has very similar effect. As a matter of very important principle, they are objectionable because they call into question the effect of the Directive of 2001.

We are glad to see that a recent text by the Council (22 February) includes wording, in its Recital 17, to safeguard the exceptions in the InfoSoc Directive. **We call for an addition to Article 8 of the Orphan Works Directive to make clear that its effects are without prejudice to the exceptions provided by Directive 2001/29/EC.**

We hope that this adjustment will likewise be non-controversial. We do not believe that the Commission, Parliament and Council intend any effect on the InfoSoc Directive. This request is simply for a technical amendment to make that clear.

5. *Mutual recognition of national licensing of orphan works (this paragraph was number 6 in our original statement)*

In our opinion it is a missed opportunity that the Directive respects the licensing of orphan works under national legislation, but shrinks from providing that an orphan work legitimately licensed in one Member State shall be considered an orphan work in all Member States. **In the interests of efficiency and in the context of the Single Market, we call for the mutual recognition of licensed orphan works to be included in the Directive.**

We recognise that agreement on this point is the least likely of the changes we should like to see. Nevertheless the point is so obvious that we continue to make it.

As mentioned in our text from 28 March, **we hope that the high-lighted difficulties will be removed in forthcoming negotiations with the Commission and Council. If they are allowed to remain, the Directive will not achieve its purpose, according to the Commission's IP strategy (http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf) of promoting the digitisation and making available of the collections of European cultural institutions (p.13). We believe that the Directive will set damaging precedents, and will be of negligible use to our member institutions. As the intended beneficiaries of the Directive, we shall ask the Parliament to reject the Directive in plenary if these problems are not solved.**

Information Sans Frontières represents the cultural institutions of Europe — archives, galleries, and libraries and museums of all kinds. We remain at your disposal for any discussions towards making orphan works available efficiently and effectively to European citizens through their cultural institutions.

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