

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” (draft 14/07/2011)

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 or broadcast in a Member State...”

Unpublished works such as amateur films are a substantial category of Orphan Works for which it should be possible to apply the Directive.

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.

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 criteria using pre-determined local sources.

Ad art. 3.3

“A diligent search is required to be carried out only in the Member State of first publication or broadcast.” ACE proposes to use “country of origin” for cinematographic works. Also it should be taken into account that with films there often is no clue as to what the country of origin is (films with no titles and/or no production year). Additional provisions for films are necessary to

determine how to proceed if there are no clues; in which country should the search be performed?
Also extra provisions for unpublished films (such as amateur film) are needed.

Ad art. 3.4 jo art.6.4

“Member States shall ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database”

“Member States shall ensure that the organisations referred to in Article 1(1) ... maintain records of their diligent search and publicly accessible records of use. “

The Directive should make provisions for the requisites of those databases. EU funding would be necessary for building up databases and rights registries.

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 this 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).”

If film heritage institutions use the works for purposes other than referred to in Article 6.2, the Member States may choose the means for authorizing this use. It should be taken into account that these means must work for the cross-border online use of films.