



Europeana Plenary 2012 2.2 Track Open Culture / Legal

14 June 2012
Salon Georges, Leuven

1. Overview

The aim of the session was to investigate the current regulatory landscape in Europe and how this affects digitisation and the making available of cultural heritage online. The session focused on the two main Directives that are currently coming out of Brussels: the Orphan Works Directive and the draft amended Public Sector Information Directive. The Directives were introduced respectively by Elaine Miller and Yvo Volman, Commission representatives and were opposed by Toby Bainton, representative from Information Sans Frontières, an advocacy group for Libraries, Archives and Museums and from Federico Morando, representative of NEXA center and the LAPSI project.

According to the Commission, the Orphan Works Directive introduces a new –mandatory– exception for the libraries, archives and museums by establishing the mutual cross-border recognition status of the Orphan Works; the initial scope has been extended to include along with printed and published works, av, phonograms, etc, also unpublished works; Compensation for re-appearing rightsholders is foreseen along with ways to calculate this compensation (ie actual harm done, whether the use was commercial, etc); partial orphans have also been included in the Directive; Commercial uses of Orphan works which was foreseen in the initial text, is removed in the compromise proposal. The beneficiaries, which are the libraries, archives and museums can make profits to reuse in digitisation although no pure commercial use of the Orphan Works is allowed. Finally, institutions will be required to publish the names of the Orphan Works in a centralized database of Orphan Works that is still to be created.

The Orphan Works Directive constitutes “another important piece of the puzzle” of solutions that the Commission is brokering to support digitisation of cultural content. Another important piece has been the Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works which was signed between library, rightsholders, publishers and collecting societies representatives last autumn and which paves the way for voluntary licensing agreements between these stakeholders and which is also mentioned in the Directive. The Directive is not likely to change much between now and September when it will officially be adopted. After this Member States have 2 years to implement it.

Points raised on the opposite side by Toby Bainton, about why the Directive may not be making it easy for cultural institutions to digitise and make available orphan works are: Compensation for reappearing rightsholders was not in the initial text and its inclusion and retrospective effect enhances uncertainty especially since the way the compensation is

estimated in not exact; the Directive does not help attract Public-Private- Partnerships which are much needed for digitisation since it does not allow for commercial exploitation of the digitized works for commercial parties; Diligent search is now a bit more complicated. For example, every embedded work and illustration in a book will need to be subject to diligent search and record keeping will be more complicated for the institutions; The cultural institutions would have preferred a “search in good faith” principle to be included in the Directive. The Directive should avoid listing the permitted uses covered and it should allow the institutions to pursue all their tasks which fall under their public mission. It should in any case state that the Directive is without prejudice to the INFOSOC directive. Toby Bainton concluded that in its current form, the Directive will likely serve a niche of digitisation projects. He then added that the MoJ needs legislative backing, to enable, for example, the cross-country recognition of the status of the orphan works.

In the Q&As that followed, it was clarified by the Commission that standalone photos do not fall under the directive.

Next, Yvo Volman from the European Commission’s INFOSOC Directorate General, introduced the draft Public Sector Information Directive that was recently amended by the Commission in a way that extends the scope of the Directive to include the museums, libraries and archives. Yvo set the scene for the draft PSI directive, linking it to the European Commission’s overall Open Data strategy and political agenda for growth and jobs. By being included in the Directive, the Cultural Institutions need to align with internal market processes: they will have to put in place transparent and non-exclusive processes for replying to requests and for charging for making available public sector information. Acknowledging the need for a transition period for the institutions, but also the huge budget cut pressures that the institutions are faced with, the Directive excludes Public-Private-Partnerships which underpin digitisation and allows for exclusive agreements to be made for a limited period. The amount of years for such exclusive agreements are currently set to 7 but this is still a point of discussion in the draft Directive.

Yvo Volman also addressed some “myths” around the Public Sector Information; that institutions will loose money; that the Directive will forbid Public-Private-Partnerships which are necessary for attracting funds for digitization; that it will add administrative burdens, ie demanding from institutions to clear 3rd party rights or do a diligent search to locate a rightsholder in order to serve potential requests; He said that these are not the intentions of the Directive and added that in 10 years of implementation of the first instance of the Directive smaller public administration bodies never complained about any additional burden put on them.

Federico Morando from NEXA reinforced some of the points made by Yvo Volman, saying, for example, that in both the proposal and the compromise proposal of the amended PSI the PPPs are clearly protected.

However, he raised the issue that the directive allows for so many exclusions for the cultural institutions that it risks applying only to the content that is produced by themselves, which is often only the content of purely administrative nature. He said that it is not likely that the Directive will impose extra burden on the smaller organizations but may involve some risk for the bigger ones who are involved in exclusive agreements already. He added that guidelines are needed to support institutions in their transition to compliance with the Directive. Finally, he mentioned that there is a neglected issue which is the special cultural laws in Italy and in Greece which may conflict with the provisions of the Directive. Other open issues to be discussed for Federico Morando are the option of preferential as opposed to exclusive commercial exploitation and the length for such agreements. For rare material, for example,



longer periods of preferential or exclusive exploitation may be needed to justify the cost of the investment. For Federico Morando, a cost/benefit study should be conducted so that more evidence is gathered around the extension of the PSI to the cultural institutions. In conclusion, he opined that although the Directive has a limited scope, it is a good step ahead.

In the panel discussion that followed, representatives from cultural institutions and the creative industries made statements around the Directives:

With regards to the PSI directive, Ben White, head of IPR at BL, underlined the importance of the PPPs for the digitization at times that the institutions are facing huge budget cuts and also said that 7 years should be the minimum duration for exclusive exploitation while for some projects 10 years or more would be necessary to attract private investment. He proposed that any information resulting from digitization, after the end of the exclusive period should be subject to the PSI and this should be added to the proposal. The retrospective effect of the PSI on old contracts may be a bit of a nightmare for institutions. With regards to the OW directive he added that provisions should be made for culturally sensitive material and for material that is substantially linked to a country even if not published within the borders of that country. The latter is particularly important for institutions from former colonial countries such as Britain, France, Belgium, etc. He finally said that more transparency is needed from the different instruments involved in the Directives' discussions so that the institutions know at each point what is being discussed and can participate more in the dialogue.

Tim Martin from Brightsolid Online who is involved in digitisation of news archives and newspapers with the British Library said that OW doesn't cover publishers of news. Newspapers can often be complex works and investing money in their digitization can be prohibitive if people step forward and claim indemnities. About the PSI Directive, he said that anything with retrospective effect is potentially damaging since contracts have been made under different conditions and with a different business model in mind than the limitations imposed from the PSI. He also agreed that for some projects 10, 15 or more years of exclusive exploitation are necessary. He added that the low hanging fruits have mostly been digitized already and that there remains the rest that may not bear so much return on investment. At the same time, he added that if an institution can strike a deal for less than 7 years exclusivity, it's a pity, also to exclude this possibility, but he felt that it's difficult to draw hard lines that may not work.

Pascal Ennaert from Cultural Heritage Flanders expressed the concern that the Public Sector Information Directive may change again in a few years, adding more restrictions on the Cultural Institutions and more strain on their already tight budgets. He said that there is increasing pressure on the institutions to make their assets available online for free while their budgets are being cut and there don't seem to be viable business models for them. He also said that the political agenda is driven by digitization and the making of money but a number of the activities that the institutions are tasked with in the real environment such as research, preservation, curation, etc, are not being catered for by politicians and funders.

In the discussion that followed some additional points were made by the Commission:

About the PSI:

- 7 years for exclusive agreements comes from the Comité des Sages report who thought that exclusivity had to be balanced against a possibility of privatization of the public domain.
- Public broadcasters are excluded from the Public Sector Information Directive and traditionally have a special role in policy-making. Also they have much more 3rd IPRs in the content they hold.



About the Orphan Works Directive:

- Institutions will have to provide the names of the orphan works they use in a central European database but will not be obliged to keep public records of their diligent searches
- The commission will be there to support the institutions in the implementation of the database of the orphan works
- The commission will review the scope for potential inclusion of the standalone photos and the publishers

→ **Contact: Georgia.angelaki@kb.nl**