

## **Stanowisko Telewizji Polskiej S.A.**

### **wobec projektu dyrektywy o utworach osieroconych**

#### **w świetle propozycji Parlamentu i Rady - kluczowe kwestie (maj 2012)**

#### **1. Umożliwienie korzystania z utworów osieroconych poprzez ich nadawanie przez nadawców publicznych.**

Projekt dyrektywy obejmuje jedynie jako dozwolone sposoby korzystania zwielokrotnienie oraz udostępnianie na żądanie (art.6 ust.1). Pomija zaś nadawanie, które stanowi esencję misji mediów publicznych i pozostaje głównym sposobem dostępu odbiorców do treści audiowizualnych. W naszej ocenie celowe jest objęcie nadawania dyrektywą. Mogłoby to nastąpić przez dodanie do art.6 ust.1 - lit.c) w brzmieniu:

*„c) by broadcasting, by wire or wireless means, within the meaning of Art.3(1) of the Directive 2001/29/EC, Art.1.2(a) and Art.2 of the Directive 93/83/EEC, and Art.8 of Directive 2006/115/EU, by public service broadcasting organisations”.*

Jeżeli zabieg taki nie jest uważany za potrzebny, z uwagi na funkcjonowanie w zakresie nadań zbiorowego zarządzania prawami i brak problemów transgranicznych, proponujemy wyjaśnienie tej kwestii w preambule dyrektywy. Propozycję taką, którą popieramy, przedstawiło EBU, proponując dodanie motywu w brzmieniu:

*„Broadcasting of works and other protected subject matter by electronic communications networks, as agreed under collective and/or individual licensing arrangements or permitted by law, is not covered by this Directive since, as soon as a solution for the use of orphan works is found on the national level, it is not considered to create difficulties for cross-border purposes, given the freedom to provide broadcasting services such as recognised in the EU law, in particular in the Satellite and Cable Directive.”*

#### **2. Szerokie ujęcie dozwolonego korzystania w ramach wszelkiej działalności związanej z misją interesu publicznego uprawnionych jednostek.**

Dozwolone dyrektywą korzystanie z utworów osieroconych powinno być ujęte – w ramach objętych dyrektywą pól eksploatacji – szeroko i dotyczyć wszelkiej działalności związanej z misją interesu publicznego uprawnionych jednostek (*related to their public interest missions*). Popieramy rozwiązanie zaproponowane w tym zakresie w ramach Rady (art.6 ust.2 i związane z nim motywy). Propozycja Parlamentu jest tutaj, w naszej ocenie, nieco za wąska i może prowadzić do niepewności prawnej co do zakresu dozwolonych dyrektywą sposobów korzystania.

### **3. Szeroki zakres utworów i dóbr pokrewnych objętych dyrektywą (w tym utworów i dóbr wkładowych – *embedded works*).**

Popieramy proponowane przez Parlament i Radę rozszerzenie dyrektywy poprzez objęcie nią nie tylko utworów, ale także przedmiotów praw pokrewnych (art.2 ust.1). Niezbędne jest także objęcie utworów i innych dóbr wkładowych, czyli założenie, że osierocenie może dotyczyć także części utworu – jak trafnie zakłada się w propozycjach Parlamentu i Rady (art.2 ust.2). Konieczne jest utrzymanie tych rozwiązań.

### **4. Objęcie utworów nieopublikowanych.**

Konieczne jest objęcie dyrektywą utworów nieopublikowanych, a - w naszej ocenie - także nierozpowszechnionych. Jest to szczególnie istotne dla Polski, gdzie w przeszłości wiele materiałów wbrew woli ich twórców nie zostało rozpowszechnionych, w wyniku interwencji cenzury albo innych przeszkód historycznych. Popieramy więc proponowany w ramach Rady art.1 ust.2a, z tym że, w naszej ocenie, należy usunąć z niego wymóg rozpowszechnienia, poprzez skreślenie wyrazów: “... *but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightholders, ...*”.

### **5. Praktyczne ujęcie starannych poszukiwań.**

Bardziej praktyczne ujęcie starannych poszukiwań, co popieramy, występuje w propozycjach Rady (art.3). Rozwiązanie proponowane przez Parlament (art. 3(1a), 3(2)1a and

3(2a)) jest, w naszej ocenie, niepotrzebnie nadmiernie skomplikowane i byłoby trudniejsze do stosowania.

#### **6. Wzajemne uznawanie obok statusu osierocenia utworu także i mechanizmów zezwalania na korzystanie z nich.**

Potrzebne jest proponowane w Radzie (art.4 i motyw 19) potwierdzenie możliwości korzystania z utworów osieroconych zgodnie z dyrektywą w sposób ponadgraniczny. Takie wzajemne uznawanie mechanizmów zezwalania na korzystanie z utworów osieroconych jest celowym uzupełnieniem wzajemnego uznawania statusu utworu osieroconego.

#### **7. Dozwolone korzystanie i wynagrodzenie.**

Popieramy proponowane przez Parlament dozwolone korzystanie oparte na specyficznym zezwoleniu, a nie (jak proponuje się w Radzie) na dozwolonym użytku (*exception or limitation*). Zasadne jest mówienie o "wynagrodzeniu", tak jak proponuje Parlament, a nie o "rekompensacie" (propozycja Rady).

#### **8. Zastrzeżenie braku uszczerbku dla rozwiązań w zakresie zarządzania prawami.**

Niezbędne jest zastrzeżenie, iż dyrektywa pozostaje bez uszczerbku dla rozwiązań w zakresie zarządzania prawami (np. takich jak rozszerzone zbiorowe licencje). Popieramy więc proponowane w Radzie doprecyzowanie motywu 20, dodanie art.1(4). Z zadowoleniem przyjmujemy też zaproponowany przez Parlament art.7a, przy czym art.1(4) w wersji Rady wydaje się jeszcze bardziej precyzyjny. Żałujemy jednak, że żadne z tych postanowień nie potwierdza wyraźnie, zgodnie ze swobodą przepływu usług w UE, ponadkrajowego skutku takich rozwiązań. W tej sytuacji proponujemy skreślenie w art.1(4) w wersji Rady wyrazów „na poziomie krajowym” („*at national level*”), dla zapewnienia większej elastyczności tego przepisu.



## NEW EBU POSITION ON THE PROPOSAL FOR AN ORPHAN WORKS DIRECTIVE

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### General comments (approach, purpose and intended effect of proposal)

*The EBU welcomes the improvements to the proposal for an Orphan Work Directive made by both the Council (draft of 12 March 2012) and the European Parliament Committee on Legal Affairs (report of 9 March 2012). They provide for an enriched scope of application while enhancing the recognition that public service broadcasters' archives can include (potentially many) works and other protected subject matter of an orphan nature. The improvements given to the definition of orphan works brings also more clarity and efficiency.*

*Nevertheless, the EBU would like to underline two important aspects which clearly need a clarification:*

Firstly, the EBU feels that the proposed Directive should also allow for the **re-broadcasting by public service broadcasting organisations of orphan works embedded in their archives**, as following on from collective and/or individual licensing arrangements or permitted by law, because this is the core of their business. If the reason for not permitting expressly this use by public service broadcasters in this Directive is that, once a solution for the use of orphan works by them is found on the national level, broadcasting of programmes including orphan works is not considered to create difficulties for cross-border purposes (given the freedom to provide broadcasting services such as recognised in the EU law, in particular in the Satellite and Cable Directive), then the EBU would suggest to clarify this in a recital.

Secondly, the EBU feels compelled to address a missed opportunity. The **proposal is intended to promote cross-border access to Europe's cultural heritage** by facilitating rights clearance for orphan works in the archives of public institutions and public service broadcasters. Neither the Parliamentary report nor the Council draft provide for legal certainty with regard to the cross-border access to works which are incorporated in the broadcasters' archive productions but which do not fall under the proposed orphan works regime. For example, the introduction of a new *mandatory European exception* for the permitted uses of orphan works, as proposed by the Council working group, would clearly ensure the dissemination of rights which are orphan. However, audiovisual (and audio) archive productions of broadcasters incorporate (many) other rights which are not orphan and may well be managed by collecting societies. Without an explicit mutual recognition in the EU level of the collective licences granted by the CMOs for the use of the rights included in the archives of public service broadcasters (e.g. for the musical rights embedded in the archives), it remains unclear whether the cultural heritage contained in the broadcaster's archives can lawfully be made available online across borders.

The EBU notices that, in the opinion of the Council, the specific solution provided for orphan works, in accordance with the future Directive, and national schemes for mass digitisation projects are different options that can run in parallel. We understand that this leaves flexibility to Member States for finding appropriate solutions with regard to collective licensing arrangements for mass digitisation, which the EBU clearly supports. However, the EBU would stress also that the online accessibility of broadcast productions under those collective licensing arrangements have not necessarily to be purely national but may have a cross-border effect. Such a clarification in the Directive would be welcome.

## Detailed comments

### - Scope (Article 1):

The EBU is glad to note that now **all works and other protected subject matter** are included in the scope of the proposal and that the audio sector is covered. The EBU also welcomes the deletion of a **cut-off date** for the works produced by public service broadcasters, as proposed by the Parliamentary report.

The inclusion of "**embedded**" **works** and other protected subject matter in the scope of the future Directive such as proposed both in the Council version and in the report of the Committee on Legal Affairs, is valuable.

Contrary to the Parliamentary report the Council version aims to include **unpublished works**, which may help give access to the public of interesting parts of EU cultural heritage. However, the need for this inclusion is possibly greater in certain countries (e.g. where a former regime may have exercised an excessive censorship) than in others.

- A possible compromise between the two versions could be to leave it to the individual Member States' own discretion to "opt-out" from this inclusion insofar as they are concerned.

The EBU also appreciates the Council proposal under Recital 9, clarifying that **co-productions** by public service broadcasters are included in the scope, irrespective of which co-producing party is responsible for the preservation.

### - Definition of an orphan work (Article 2):

The drafting has been substantially improved both in the versions of the Council and in that of the Parliament, especially in cases where the work or the phonogram has more than one right holder.

### - Diligent search (Article 3):

- The EBU prefers the wording of the Council version (Article 3) as opposed to the new provision under Art. 3(1a), 3(2)1a and 3(2a) of the EP proposal. This wording provides for a more practicable solution.
- The wording on the Recital 16a) in the Council draft is also preferable to the one in the EP report, as it refers to the remedies in force in the Member States for copyright infringement when a work or other protected subject matter has been considered wrongly orphan.

Insofar as the creation of **new databases** is concerned, the EBU generally supports access to records of information identifying works which have orphan status and providing updates in case of a change of the status.

- The EBU prefers the proposal in the EP version to interconnect the databases as much as possible. However, those requirements should entitle users to entrust collective rights management organisations with such a task (as done in the EP version) given the fact that setting up databases' networks is already a general part of their activities.

- **Mutual recognition of orphan works status (Article 4)**

The clarification in the Council version that an orphan work "may be used and accessed in accordance with this directive in all Member States" is valuable. In the EBU's view such a clarification is lacking in the report of the EP Committee on Legal Affairs.

- **Types of authorised uses (Articles 6 and 7):**

The limitation to on-demand services risks to be misinterpreted to the extent that a **re-broadcast (by any means) by public service broadcasters** of any archive material which may happen to include an orphan work would not be possible as a result of this Directive (unless access thereto were denied from abroad). As the core activity of broadcasters is broadcasting, the EBU sees no justification for such a limitation. The EBU understands that this restriction may be relevant for the print sector, but it would not be adequate for audio or audiovisual broadcast programme material.

- The EBU proposes a clarification in a recital that *broadcasting of works and other protected subject matter by electronic communications networks, as agreed under collective and/or individual licensing arrangements or permitted by law, is not covered by this Directive since, as soon as a solution for the use of orphan works is found on the national level, it is not considered to create difficulties for cross-border purposes, given the freedom to provide broadcasting services such as recognised in the EU law, in particular in the Satellite and Cable Directive.*

The permitted or otherwise authorised uses of orphan works should correspond to the activities of public service broadcasters related to their public interest missions, and should give full legal certainty about the type of use which they are allowed to make of a given orphan work in this framework.

- The current wording proposed by the Council (Article 6 and related recitals) which stipulates that organisations may use an orphan work "in order to achieve aims related to their public interest missions" would clearly be preferable to the one voted in the EP Committee on Legal Affairs. It would ensure that all activities linked to the public interest missions of public service broadcasters would be covered and by way of consequence offer a better degree of legal certainty as to the permitted or otherwise authorised uses of orphan works.

- **Remuneration for the rightholders (Articles 5, 6 and 7):**

The EBU naturally embraces the principle of paying the right holders for the use of their work.

- In that context, the use of the word "remuneration" is preferred above the word "compensation".
- Moreover, the addition by the Council in Recital 16 of the wording "the compensation [/remuneration] shall be determined by the Member States where the organisation that uses the work is established" is a step in the right direction, as it gives some flexibility.

- **Subsidiarity (Recital 20, EP new Article 7a, Article 8 and Council new Article 1(4) and mutual recognition (Recital 6, Article 4):**

The EBU supports the improvement of Recital 20, which states that the Directive is without prejudice to **any** national arrangements. The wording of the Council version brings even more clarity than that of the EP, provided that the word "the" (arrangements) is replaced by "any".

It is also very much welcome that a similar provision is now explicitly included in a new Article 7a of the EP version.

As already mentioned the EBU also supports the additional wording proposed by the Council in Article 4 (mutual recognition of orphan work status) that an orphan work "may be used and accessed in accordance with this Directive in all Member States". This recognition is absolutely necessary in the EBU view.

Furthermore, the EBU understands from the Council text that the Directive would not affect the ability of Member States to regulate the exercise of rights to the extent needed for mass digitisation projects.

- The EBU therefore supports the Council proposal for a new Art. 1(4) which emphasises that *"this directive does not interfere with any arrangement concerning the management of rights at national level"*, as it provides even more clarity than the EP proposal for a new Art. 7a.
- However, as explained above, the lack of (explicit) legal certainty on the cross-border effect of the latter type of arrangements is a clearly missed opportunity. **The EBU would therefore propose to delete, in the newly proposed Article 1(4) in the Council version, the last words "at national level"**, as these words seem to restrict the scope of those arrangements unnecessarily to the national level, and deletion thereof would permit more flexibility.

Finally, it goes without saying that the EBU supports the insertion of a new Art. 7b (on measures to prevent future orphan works) as proposed by the EP version.