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Mr José Manuel Barroso  
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Berlin, 20 August 2010

Ref: Letter on behalf of the European Network for Copyright in Support of Education and Science (ENCES) with regard to the proposed bill on orphan works

Dear President Barroso

The European Network for Copyright in Support of Education and Science (ENCES) is a civil organisation that represents the interests of scholars and educators in the EU with respect to copyright. Members of the network include Academies of Sciences of various EU Member States, libraries, library associations and leading European legal research institutes.

ENCES welcomes the Digital Agenda and applauds its overall aim to get Europe on track for smart, sustainable and inclusive growth.

Simplifying copyright clearance and managing cross-border licensing are among the major problems that will have to be solved in order to provide Europeans with a better quality of life through new media opportunities and easier access to cultural content. ENCES supports the Commission's commitment to create a legal framework to facilitate the digitization and dissemination of cultural works in Europe, as outlined in Key Action 1 of the Digital Agenda.<sup>1</sup> We also appreciate that the Commission plans to push forward the debate about orphan works.

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<sup>1</sup> [http://ec.europa.eu/information\\_society/digital-agenda/documents/digital-agenda-communication-en.pdf](http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf)

Nonetheless ENCES worries about whether the regulation on orphan works currently under development will sufficiently take into account the concern of an increasing number of European scholars and educators that Europe's rich and diverse cultural heritage be digitized, be preserved for the future, and be made widely accessible to the public via libraries, archives and museums. Researchers and scholars in Europe need free and easy access to cultural heritage materials and to research results to enhance their productivity and competitiveness.

The Commission's i2010 strategy on Digital Libraries and the digital economy states: "Once digitised, Europe's cultural heritage ... will be a rich source of raw material to be re-used for added-value services and products in sectors such as tourism and education ...

Furthermore, digitization efforts will have considerable spin-offs for firms developing new technologies."<sup>2</sup>

As suggested in the Commission's Communication "Copyright in the Knowledge Economy"<sup>3</sup>, it is important to improve regulations concerning orphan works in the internal market because the present situation "leads to a situation where millions of works cannot be copied or otherwise used". The Communication notes further that there is a "risk that a significant proportion of orphan works cannot be incorporated into mass-scale digitization and heritage preservation efforts such as *Europeana* or similar projects."

The objective of *Europeana*, as the multilingual access point to Europe's cultural heritage, is to put online the collections held by Europe's libraries, archives, museums and audiovisual archives – vast numbers of books and periodicals and millions of hours of film and video covering the whole of Europe's diverse history and culture.<sup>4</sup>

To facilitate digitization, preservation and free accessibility for all of Europe's cultural and scientific heritage for educational and scientific purposes, as well as for private studies of all citizens of the EU, ENCES suggests the following:

*(1) A solution for all sorts of works is needed.*

With regard to the forthcoming Green Paper addressing the opportunities and challenges of the online distribution of audiovisual works, it is important for the new directive on orphan works to provide an effective solution for all sorts of works, whether text-based or audiovisual, and whether visual/photography or music/sound. The recently published comprehensive study "Assessment of the Orphan works issue and Costs for Rights Clearance"<sup>5</sup> undertaken on behalf of the Commission shows high percentages of orphan works for almost all categories of works, especially among photographs and audiovisual materials. An estimated number of approximately 225,000 film works in European archives would be lost for digitization projects, for preservation and for online accessibility for education and research if

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<sup>2</sup> COM(2005) 465 final, 30 September 2005.

<sup>3</sup> COM(2009) 532 final, 19 October 2009.

<sup>4</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/cultural/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/cultural/index_en.htm)

<sup>5</sup> Anna Vuopala, Assessment of the Orphan works issue and Costs for Rights Clearance. Study on behalf of the European Commission, DG Information Society and Media, Unit E4, Access to Information, May 2010. To be retrieved at [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/reports\\_orphan/anna\\_report.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf); last visited on 5 August 2010.

audiovisual materials were excluded from the regulation on the orphan works. The same applies to photographs, which are traditionally held in huge numbers by museums, and to musical works and sound recordings held by libraries, museums and sound archives all over Europe. They need to be converted to digital formats through mass digitization projects in order to be made available for public study and research.

*(2) The guidelines for diligent search must reflect the necessities of mass digitization.*

The study mentioned above shows that the costs of rights clearance for the digitization and online access for orphan works are extremely high and may amount to several times the cost of digitizing the material: “The experiences of institutions indicate that a title by title rights clearance can be prohibitively costly and complex, especially in case of large scale digitization projects.”<sup>6</sup>

Digitization projects are cost-intensive – therefore the guidelines for diligent search should reflect the requirements of mass digitization. Since the digitization costs are high, cultural institutions cannot fund an exhaustive search for every single item plus the licence fees on their own. In order to facilitate mass digitization the Commission should consider whether the transaction costs of rights clearance could be distributed proportionally between the cultural institutions and the collecting societies.

In addition, the criteria defining due diligence with regard to a search for the rights holders must be reasonable to facilitate mass digitization. ENCES cannot accept any regulation of the orphan works problem failing to address the needs of libraries and other culture preserving institutions like archives and museums. The new regulation on orphan works must not leave them in a situation which would only lead to their not engaging in mass digitization of their collections of the 19th and 20th century at all.

New regulation on orphan works should take global factors and consequences into account. A “black hole” in the cultural and scientific heritage of Europe would leave Europe at a competitive disadvantage. It might fall back far behind the USA or the Asian markets.

In short, any smart, sustainable and inclusive legal solution to the problems concerning orphan works should:

- (1) take into account the needs of the cultural institutions that preserve our cultural heritage as well as the needs of scholars and educators across Europe;
- (2) be taken on an EU level and be legally binding for all Member States to avoid further problems resulting from insufficient harmonisation between national legislations.

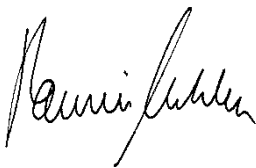
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<sup>6</sup> Ibid., 6.

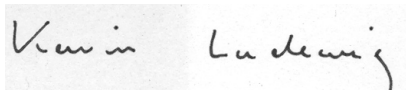
ENCES proposes that the InfoSoc Directive 2001/29/EU include a binding exception for the digitization, preservation and dissemination and use of orphan works by cultural institutions such as libraries, archives and museums.<sup>7</sup>

ENCES hopes that the European Commission will consider our remarks and suggestions in its decision process on the regulation of the orphan works problem.

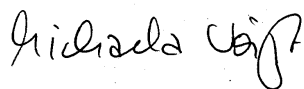
Respectfully yours



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<sup>7</sup> DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; L 167/10, 22 June 2001.

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